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I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Signed:

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Description of Research Methodology:

The majority of this work was conducted as a desktop study, and the bibliography is included below the body of the paper. However, the paper is also informed by a number of personal interviews and communications conducted with people involved with or affected by the creation of the KAZA TFCA. These individuals included Dr Leo Braack (Director of the Transfrontier division of Conservation International), Mr Adam Young (Director of Chobezi Ltd, a tourism operation based in Botswana but specializing in transfrontier tourism), certain Namibian and Botswana immigration officials, Mr Fynn Corry (former Operations Manager of Sioma Ngwezi National Park, Zambia) and Mr Vladimir Russo (advisor to the Minister of Environment and Urban Affairs, Angola), as well as the attendance of a lecture by Dr Maano Ramutsindela (a specialist in transfrontier conservation areas who is based in the Department of Environmental and Geographical Science at the University of Cape Town).

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List of Abbreviations:

AU: African Union

CBD:	Convention on Biodiversity
CITES:	Convention on International Trade in Endangered Species
CMS:	Convention on Migratory Species
KAZA:	Kavango-Zambezi
MoU:	Memorandum of Understanding
SADC:	South African Development Community
TFCA:	Transfrontier Conservation Area

1. INTRODUCTION

Since the official opening in 2000 of the Kgalakgadi Transfrontier Park which straddles the border between Botswana and South Africa, political leaders in the SADC (South African Development Community) region have increasingly embraced and promoted the concept of Trans Frontier Conservation Areas (TFCAs)¹. Political boundaries between the countries of Africa were initially established during the ‘Scramble for Africa’ in the nineteenth century², and were generally representative of compromises between the competing interests of the colonising states. Boundaries were delineated along geometric or linear projections on maps, or otherwise corresponded with geographic features such as rivers or mountain ranges³. The boundaries therefore ignored not only the distribution of existing African populations but also fragmented ecosystems. In many cases, fences were erected along these borders, hampering traditional migration routes⁴. Consequently, many ecosystems were divided internationally and different management plans applied to their separate parts. One of the principal features of TFCAs is obviously that they aim to straddle these international boundaries and create areas of co-operative management.

Another distinctive feature of the TFCA concept is the emphasis on multiple resource use within the area. Effectively, they may incorporate an amalgam of different land-use regimes and types of natural resource utilisation within their boundaries, even including consumptive use⁵. This is a fundamental shift away from the original concept of trans-frontier parks, such as the Kgalakgadi Transfrontier Park, which only encompassed already-protected conservation areas such as national parks. The definition of ‘Transfrontier Conservation Area’ as given in the Preamble of the Memorandum of

¹ Hanks, J: ‘Transfrontier Conservation Areas (TFCAs) in southern Africa: their role in conserving biodiversity, socioeconomic development and promoting a culture of peace.’ (Journal of Sustainable Forestry 17(1/2): 127-148. (2003).

² Mayoral-Phillips A.J: ‘Transboundary Areas in Southern Africa: Meeting the Needs of Conservation or Development?’

³ Mayoral-Phillips, *supra* note 2

⁴ Hanks, J, *supra* note 1

⁵ Suich, Helen with Kennedy, Elizabeth; Bruner, Aaron; Pilgrim, John and Vynne, Stacy: ‘Transfrontier Conservation Areas Conservation and Socio-Economic Impact Indicators.

Understanding for the KAZA TFCA emphasises this difference between a Transfrontier Conservation Area and a Transfrontier Park, as it specifies that such an area is a:

‘large ecological region that straddles the boundaries of two or more countries, encompassing one or more protected areas, as well as multiple resources use areas’

The KAZA TFCA is one of the largest TFCAs ever conceived of, incorporating a massive area of 278 000 square kilometres of savannah, wetlands, rivers and woodlands. At five times the size of the Kruger National Park, and roughly the size of Italy, it includes areas of no less than five SADC (South African Development Corporation) countries, namely Angola, Botswana, Namibia, Zambia and Zimbabwe. A number of features of outstanding natural interest, such as the Victoria Falls, the Kafue wetlands and the Okavango Swamps lie within the area, which also includes several highly significant river systems, namely the Okavango, Zambezi and Chobe Rivers.

As a consequence of its massive size, the development incorporates an especially wide variety of land-use regimes. Fourteen national parks and game reserves have been enveloped, but there are also a large number of conservancies, game management areas and tourism of hunting concessions within the area⁶, as can be seen from the map above. Furthermore, there are territories now included in the park where local communities have been resident for generations.

Significantly, a portion of the KAZA TFCA is home to Africa's largest population of African Elephant (*Loxodonta africana*). More than 130 000 elephant live in the Chobe region of Botswana, and a barrier of landmines in the Cuando-Cubango Province of Angola prevents these elephant from reaching their historical foraging grounds in Angola and Zambia⁷. One of the most high-profile aspects of the KAZA TFCA development is the de-mining of this area to create a corridor for elephant and other wildlife. A long-running and highly controversial debate exists as to whether the Chobe elephant population should be controlled by culling. If the existing bottle-neck were relieved by opening up migratory corridors, advocates of the TFCA argue, then such culling might not be required⁸.

⁶ Concept Paper: Transfrontier Conservation and Tourism Development in the Okavango and Upper Zambezi River Basins.

⁷ Roots of Peace and Conservation International – July 5th 2005 Press Release – ‘New Partnership to Clear Landmines for African Elephants’.

⁸ Hanks, J, quoted in Rogers, D ‘Roving Ambassadors for Transfrontier Conservation’ <http://www.africa-geographic.com/Archives>

TFCAs have been lauded for their putative multi-faceted role. This role is usually interpreted as three-fold – the function of these areas is to promote a culture of peace, to play a role in socioeconomic development and to conserve biodiversity⁹¹⁰. Biodiversity conservation is in fact generally accepted to be of primary importance in TFCA development. This paper deals with the effectiveness of TFCAs as legal instruments in the achievement of biodiversity conservation, and with the effectiveness of the KAZA TFCA in particular.

With reference to biodiversity conservation, it is now generally accepted that it is too late to conserve all species or areas that are under threat. Consequently, a ‘triage strategy’ has been adopted in the selection of which areas to conserve¹¹. In terms of this strategy, conservation efforts are focused upon those areas with the highest concentrations of endemic species which are the most threatened by habitat loss. This is a species-based approach, reinforced by the assumption that when habitat is fragmented, there will be species loss. It is precisely this habitat fragmentation which the very concept of TFCAs can hope to overcome, particularly through the medium of wildlife corridors.

In terms of the triage strategy, the elephant cannot but be a significant species. It is a species which captures the imagination of the public (which is significant in terms of both tourism and donor funding) and furthermore elephant populations have an undeniable impact upon the ecology of any area which they inhabit. The de-mining of the corridor through the Cuando-Cubango Province is a topic which has been widely publicised and has become an issue which many people internationally identify with the KAZA TFCA. The African elephant in the context of the KAZA TFCA can truly be said to be both a keystone and a flagship species.

At the international level, there are various conventions which have the potential to affect the management or conservation of the wildlife population within the KAZA TFCA area. These include the Convention on International Trade in Endangered Species of Flora and

⁹ Hanks, J; *supra* note 1

¹⁰ Suich, H; *supra* note 5

¹¹ Hanks, J; *supra* note 1

Fauna (CITES), the Convention on Migratory Species (CMS) and the Convention on Biodiversity (CBD). However, not all of the five countries have ratified the same conventions. At the regional level, all five of the countries involved in the KAZA TFCA are party to the SADC Protocol on Wildlife Management, as signed in August of 1999. At the domestic level, each country has its own Acts, amendments and promulgations relating to wildlife management and policy. Many countries in the SADC region have emerged only recently from fraught struggles for independence, and it would be an unlikely area in which to find states willing to sacrifice any aspects of their sovereignty in the cause of conservation. TFCA agreements such as the bilateral agreement between Botswana and South Africa which established the Kgalakgadi Transfrontier Park can specifically recognise the 'sovereign equality and territorial integrity' of the relevant states, but there are commentators who believe that it is difficult to refer to an 'undivided ecosystem' in a situation where sovereignty remains intact, and effective management of these areas may be hampered¹².

The issue of sovereignty lies at the heart of transboundary wildlife management in Southern Africa. Multilateral conventions such as the Convention on Biodiversity may claim to respect sovereignty¹³. However, membership of such conventions infers international responsibilities and obligations which are ultimately erosive of the concept of absolute sovereignty. This erosion is often responsible on the one hand for the non-accession of States to treaties or conventions which they see as infringements of sovereignty, and, on the other hand, is the reason for the non-enforceability and 'toothlessness' of many international conventions¹⁴. There is always a balance which needs to be struck, in order that a convention be inoffensive enough to encourage States to become members and yet still bear some weight as a legal instrument. Any convention which deals with transboundary issues and requires transboundary cooperation is even more likely to impinge on traditional perceptions of sovereignty, as such a document necessarily attempts to impose certain standards of practice between neighbouring states.

¹² Mramba, Sist J 'The Peace Parks Initiative: A Breakthrough Towards Sustainable Natural Resource Management in Southern Africa?' 214 11 SAJELP (2004).

¹³ Preamble to the Convention on Biodiversity

¹⁴ Glazewski, Jan, pers.comms

There exists at present a multi-layered mosaic of legislation purporting to play some role in the conservation and management of the KAZA TFCA region. What remains to be explored is the effectiveness of the existing legislation and the potential effect of the TFCA MoU. Will this document comprise an efficient and comprehensive action plan for the region as a whole, unifying and simplifying the present morass of policy statements and promulgations, or will it simply add another stratum of uncertain practical value?

2. LEGAL INSTRUMENTS AT THE INTERNATIONAL LEVEL

2.1: Introduction

The table below illustrates the international biodiversity-related conventions which each of the KAZA TFCA member states have acceded to. It is immediately apparent that such membership is patchy and inconsistent. Indeed, the only convention of which all five states are members is the Convention on Biodiversity. Furthermore, this Convention is the only one which Angola is in fact a member of. None of the States are party to the Migratory Species Convention, as elaborated upon below. This pattern of omission and inconsistency is incompatible with the intentions which lie behind the establishment of any Transfrontier conservation area. Hanks¹⁵ and other commentators maintain that the motivating factors for the establishment of TFCAs are, broadly speaking, the conservation of biodiversity, socioeconomic development, and the promotion of a culture of peace. The lack of coherent membership of these international conventions does not speak of a spirit of international cooperation which would necessarily underlie a culture of peace. The lack of accession to these conventions, which are broadly grouped as ‘the biodiversity conventions’, does not speak of an existing commitment to trans-frontier biodiversity conservation. Essentially a question remains to be answered as to why these five countries are seeking to adopt resolutions and MoU’s with aims identical in many respects to those of existing conventions which they have chosen to ignore.

¹⁵ Hanks, J; *supra* note 1

	ANGOLA	BOTSWANA	NAMIBIA	ZAMBIA	ZIMBABWE
CBD	●	●	●	●	●
CITES	—	●	●	●	●
CMS	—	—	—	—	—
WHC	—	●	—	●	●
RAMSAR	—	●	●	●	—

Figure 2: Table illustrating the patchy and inconsistent membership of the international biodiversity-related conventions of the KAZA TFCA member States¹⁶

CBD: Convention on Biodiversity

CITES: Convention on International Trade in Endangered Species of Flora and Fauna

CMS: Convention on Migratory Species

WHC: World Heritage Site Convention

This paper does not have the scope to examine all the possible reasons for the inconsistent and often poor representation of the SADC states in terms of international treaties. However, it is an undeniable truth that many African countries have achieved independence at great cost, and their hard-won sovereignty is a closely-guarded commodity. The international conventions described below are all the results of Northern, developed-nation initiatives, and there may exist a certain resistance to them for this reason. Possibly, regional conventions, such as the SADC Wildlife Protocol, and regional initiatives such as the KAZA TFCA are more likely to gain support precisely because of the fact that they are local initiatives and are not being imposed upon African nations by the developed nations. The developed nations primarily responsible for the establishment

¹⁶ References here comprise the relevant pages of the official websites for each convention:

CBD: <http://www.biodiversity.org/world/parties.asp>

CITES: <http://www.cites.org/eng/disc/parties/alphabet.shtml>

CMS: http://www.cms.int/about/part_1st.htm

WHC: <http://www.whc.unesco.org/en/list>

Ramsar: <http://www.ramsar.org/key-cp-e.htm>

of international conventions such as the biodiversity conventions are in many instances the nations whom the African states struggled to gain independence from, and it is in this respect perhaps not surprising that they should be reluctant to compromise any aspect of sovereignty in order to accede to such conventions. Where the initiatives are locally driven however, States may be more willing to compromise in order to achieve common goals which they view as more representative of their interests.

2.2: THE CONVENTION ON BIODIVERSITY (THE CBD):

The Convention on Biodiversity enjoys a unique position in relation to the KAZA TFCA in that it is the only biodiversity convention which all five countries have acceded to, and also the only biodiversity convention of which Angola is a member. When parties ratify the treaty, they affirm their sovereign rights over their own biological resources, but also accept responsibility for conserving biological diversity and using biological resources in a sustainable manner¹⁷. The primary focus of the convention is on sustainable development¹⁸, and the convention provides specifically for developed party States to provide financial assistance to developing States in order to allow them to meet the financial obligations incurred in implementing the treaty¹⁹, which may have been instrumental in encouraging the developing nations such as those in the KAZA TFCA area to become parties to the Convention.

The Convention on Biodiversity is an extremely important convention in terms of conservation, and the consistent membership of the CBD in the KAZA area is significant in that it suggests initially a united attitude towards the protection of biodiversity. However, the CBD is only one of a suite of biodiversity conventions and is also essentially a framework document with little provision for direct enforcement. Membership of the CBD does not obviate the necessity of membership of the other

¹⁷ ¹⁷ Ciesin Thematic Guides – The Convention on Biodiversity
<http://www.ciesin.org/TG/PI/TREATY/bio.html>

¹⁸ Ibid

¹⁹ CBD, Article 20

biodiversity conventions which are aimed at specific areas of biodiversity conservation (such as migratory species or wetlands). Furthermore, mere membership of the CBD achieves little if its provisions are not implemented at the domestic level.

2.3 CITES: THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

CITES is the convention which immediately comes to mind when considering issues regarding elephant management in the SADC region, chiefly in consequence of the heated debate in recent years with regard to trade in ivory. CITES is a multilateral treaty designed to protect species of plants and animals determined by the Convention to be presently or foreseeably threatened by commercial movement²⁰. The basic premise of the Convention is that wildlife conservation can be improved by controlling trade in endangered species, in order to reduce over-exploitative trade of certain species while enhancing the free commercial movement of plentiful wildlife²¹.

The mechanisms of CITES involve a system of import and export permits which serve as basic control mechanisms in regulating the international passage of those species judged to be threatened with extinction. Species which the scientific body of the CITES organisation regard as requiring trade protection are listed in one of three appendices. This listing determines what permits are required to trade in that species, as well as what conditions must be met before such permits will be issued. Appendix I is the strictest category and species listed therein have been classified as 'presently' endangered, while species in Appendix II are 'potentially' endangered. Appendix III incorporates those species which are 'locally' endangered²². These species are not endangered on an

²⁰ Convention on International Trade in Endangered Species of Wild Fauna and Flora, July 1, 1975 (CITES)

²¹ Schofield, A.H. 'International Trade in Wildlife: How Effective is the Endangered Species Treaty?' *California Western International Law Journal* Vol. 15 (1985)

²² Schofield, *supra* note 22

international scale but are considered by an individual party state as subject to regulation within its own jurisdiction and other CITES members are expected to respect this.

The primary distinction, for our purposes, between Appendix I and Appendix II species is that commercial trade is not permitted (except in very exceptional circumstances) for Appendix I species, whereas Appendix II species may be traded for commercial purposes; albeit subject to strict regulation. The foundation of the furore in the mid-1990's was that countries in the so-called 'Consumptive Use Bloc' of Southern Africa proposed the downlisting of the African elephant from Appendix I to Appendix II²³. The chief purpose of this putative downlisting was to allow commercial trade in ivory – a huge potential source of income for these countries.

The countries in the Consumptive Use Bloc included four of the five countries currently party to the KAZA TFCA MoU, namely Botswana, Namibia, Zambia and Zimbabwe. Angola never became a party to CITES. The reasons behind this are not entirely certain but cannot be unrelated to the reality of the bloody civil war that gripped the country throughout the period in which it might otherwise have acceded to the Convention previously. What is undeniable is that Angola emerged from this tortured period of history some years ago and has as yet failed to become a recognised party to CITES²⁴. Angola's National Assembly did 'approve' the Convention in 2001²⁵, but as yet have made no attempt to embody its provisions into national law, and are not recognised as a party by the CITES administration. This is an alarming omission. CITES is the most widely accepted international conservation consensus ever developed²⁶ and a reluctance to accede to the treaty may be indicative of a lack of concurrence with its underlying philosophies and objectives. The practical legal aspects are also ominous in terms of the conservation objectives of the KAZA TFCA. One of CITES's most controversial provisions is contained in Article X, which is titled 'Trade with States not Party to the

²³ 'The CITES Fort Lauderdale Criteria: The Uses and Limits of Science in International Conservation Decisionmaking' Notes - Harvard Law Review Vol. 114 no.6 (2001)

²⁴ Benn, Penelope –Research Assistant, CITES Secretariat, pers. comms

²⁵ National Biodiversity Strategy and Action Plan Project 00011125, Ministry of Urban Affairs and Environment, Angola, Legal Deposit no 3002/06, published May 2006

²⁶ Schofield, *supra* note 22

Convention'. In terms of Article X, this trade with non-parties requires only that 'comparable documentation' be issued by the 'competent authorities' in the non-Party State which 'substantially comply' with CITES's own requirement with regard to permit and certificates²⁷. The Convention does not in any way define or quantify the terms 'comparable', 'competent' or 'substantially'. This is a horrifyingly vague provision, and lays the Convention open to abuse. Essentially, this provision of CITES allows non-members with commercial interests, such as Angola, to make scientific determinations which should be made by the more objective Scientific Council of the Convention. The precise reason why many nations decline to ratify CITES is because their wildlife trade is extensive²⁸, or because they simply have more to gain from non-membership and membership is viewed as a threat to prospective economic benefits. Whatever the reasons behind Angola's non-membership, the resultant effect is that elephant are protected by CITES provisions until they cross the Angolan border, whereupon these provisions cease to operate, unless other legal instruments exist which will take the place of such provisions. Conversely, if Angola does formalise its putative membership of CITES, it will be the only country of the KAZA TFCA member states that does not form part of the 'consumptive use bloc'.

The consequence of the collective pressure of the Consumptive Use Bloc was not in fact a general downlisting of elephant to Appendix II, but an exemption which in theory allows limited trade in elephant products. The practical legal effect of this exemption is similar to that of a downlisting for these specific countries, or a reservation in terms of Article XXIII. In terms of Article XXIII however, specific reservations must be entered at the time of ratification, acceptance, approval or accession. The political effects of the exemption were those of damage to the credibility of CITES as an effective organisation. Other member states felt that the Convention had been held hostage by the Bloc, and the issue became an emotional and divisive one²⁹.

²⁷ CITES, *supra*. Article X

²⁸ Schofield, *supra* note 22

²⁹ Harvard Law Review, *supra* note 24

The relevant strengths and weaknesses of CITES as an instrument of conservation of the elephant and of other wildlife must be evaluated both on their own merits and in light of the exemption enjoyed by Botswana, Namibia, Zambia and Zimbabwe, and of Angola's non-membership.

Article VIII describes the measures to be taken by the Parties in order to enforce the provisions of the Convention and to prohibit trade in specimens in violation thereof. CITES is not a self-executing treaty and the responsibility for enforcing its provisions is relegated to each Party State³⁰. CITES is consequently implemented differently by each party in terms of its own enabling wildlife legislation³¹. A lack of effective enforcement mechanisms is a familiar weakness of international treaties, and CITES suffers further from a history of inadequate deterrence to violations of the Convention³².

2.4 THE CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS (THE BONN CONVENTION, or CMS)

In light of the current trend in Southern Africa towards the establishment of TFCAs³³, which place emphasis on the restoration of traditional migration routes for wildlife, it is at first glance surprising that the Bonn Convention has such poor representation in the region. The CMS is unique in that it is the only wildlife convention aimed at the protection of individual migratory species.

One of the most well-publicised aims of the KAZA TFCA, as described above, is the re-establishment of historic migratory routes for Chobe's bottlenecked elephant population – and yet not one of the five countries involved is a party to the Migratory Species Convention. As explained above, one of the three primary aims of establishing TFCAs is

³⁰ CITES article VIII (1)

³¹ Schofield, *supra* note 22

³² Schofield, *supra* note 22

³³ Numerous TFCAs such as the Kgalakgadi Trans Frontier Park, the Greater Limpopo Transfrontier Conservation Area, the Mapungubwe transfrontier area and the Lesotho Drakensberg transfrontier area have been established in the past few years, and many others have recently been proposed

the maintenance of biodiversity, and the Bonn Convention is one of the biodiversity conventions. The Preamble to the Convention explicitly states that ‘conservation and effective management of migratory species of wild animals require the concerted action of all States within the national jurisdictional boundaries of which such species spend any part of their life cycle’. It is obvious that these principles parallel the intention behind the establishment of TFCAs.

The Convention provides for the listing of migratory species on Appendices I or II, depending upon their conservation status³⁴, and Parties are required to protect the Appendix I species within their own territories, and conclude agreements with neighbouring States to benefit migratory species listed on Appendix II. A species may be listed on both Appendices³⁵. Range States must provide information on the movement, ecology and conservation status of species from either Appendix within their territories, and endeavour to suppress illegal taking and to maintain habitats. Furthermore, the Convention contains more effective enforcement mechanisms than many international treaties, including CITES³⁶. The five KAZA TFCA countries lie within what is referred to as ‘the SADC gap’³⁷; a band of countries which have not acceded to the CMS and constitute a significant lacuna in the Convention’s otherwise strong representation in Africa. The reason for this gap is presumed to be a reaction from the countries involved against the CITES dispute in the 1980’s and 1990’s³⁸, wherein the Southern African ivory-producing countries felt that the international convention in issue was adversely affecting their national jurisdiction over their own wildlife reserves. Although the issue was resolved in terms of CITES and the States involved were given localised dispensations, a negative feeling towards similar conventions was engendered, and this caused these countries not to become members of the CMS for fear of further interference. This attitude, whilst understandable, does beg the question whether these countries will now be prepared to tolerate the interference with their national wildlife reserves which membership of the KAZA TFCA may necessarily involve. This is

³⁴ CMS, Articles III and IV

³⁵ CMS, Art. IV(2).

³⁶ Hepworth, Robert; Secretary-General of the CMS, pers.comms

³⁷ Ibid

³⁸ Ibid

particularly relevant with regard to the very species which brought about the countries reluctance to join the CMS in the first place – namely the elephant population.

2.5 THE RAMSAR CONVENTION:

The mission of the Ramsar Convention is the ‘conservation and wise use of all wetlands, through local, regional and national actions and international co-operation, as a contribution towards achieving sustainable development throughout the world.’³⁹ The significance of Ramsar in terms of biodiversity conservation really depends upon the conservation of a *network* of wetlands, and this significance is undermined by the patchy membership of the KAZA TFCA countries and the inconsistent application of Ramsar principles within those countries which are Ramsar members. Only Botswana, Namibia and Zambia are parties to the Convention, despite the existence of a number of significant wetlands within Zimbabwe and Angola which would undoubtedly qualify these States for membership. In order to join Ramsar, a State must select at least one national wetland. Botswana has selected only one wetland site, the Okavango Swamps, but this is a wetland of considerable importance as it is the largest wetland included in the Ramsar Convention and is also a significant tourist draw card. Namibia has selected three sites, but none of these fall within the KAZA TFCA area. Of Zambia’s three sites, the Kafue Flats site falls close to the border of the area (see Figure 1) but is inexplicably not included within it. Thus, only one Ramsar sites in included within the KAZA TFCA area , while there are potentially several other important wetlands which could have been included, such as the Linyanti Swamps area which lies in both Botswana and Namibia, extending for approximately 1850 square kilometres⁴⁰, and several areas of the Zambezi valley. The inclusion of these sites would have created a network of protected Ramsar wetlands within the KAZA. The concept of a network rather than a number of isolated wetlands is

³⁹ Ramsar COP8 2002, as quoted on <http://www.ramsar.org>

⁴⁰ Inventory of Wetlands in Botswana: <http://www.envirobotswana.gov.bw/ncsaword/wetlands.rtf>

important particularly in terms of migratory birds which act as dispersal agents as they travel from one wetland to another along their migration routes, and in this way are vital vectors for biodiversity⁴¹. All of the five KAZA States suffer habitually from drought, which is likely to be exacerbated by climate change in the years to come and may shrink the existing network of wetlands even further, reducing the potential for dispersal by migratory birds. Once again, the lack of cohesive Ramsar membership and practice are not indicative of a multilateral commitment to the maintenance and promotion of biodiversity in the KAZA region. Furthermore, the countries which are not party to Ramsar are ignoring a potentially important international mechanism which might otherwise provide funding and information for conservation of their own wetlands.

2.6 CONVENTION CONCERNING THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE (WHC):

The WHC differs from the other biodiversity conventions in that it is not primarily concerned with the maintenance of biodiversity. However, the Convention aims at the protection of both cultural and natural heritage, and many of the natural heritage sites under the auspices of the Convention are of enormous importance for biodiversity, such as Australia's Great Barrier Reef and the Serengeti plains of Tanzania.

Of the KAZA TFCA countries, only Botswana, Zambia and Zimbabwe are members of the WHC. Party States are encouraged to nominate sites of international cultural or natural heritage significance within their territories and then establish management plans and set up reporting systems on the state of conservation of their World Heritage sites. Again, Botswana has nominated only one site, the minimum for membership of the Convention, but this site is the Tsodilo Hills which falls within the KAZA TFCA. Zambia

⁴¹ Underhill, L.G 'Migratory Birds' in G.I Cowan (ed), 'Wetlands of South Africa 1995' (Dept of Environmental Affairs and Tourism)

has nominated only Mosi-oa-Tunya/ Victoria Falls, which it shares with Zimbabwe and also falls within the KAZA area. Zimbabwe has nominated a total of five sites⁴².

Whilst it is suggested that this Convention is not as directly relevant to conservation within the KAZA TFCA as the other biodiversity conventions, it is also apparent that it is under-utilised. There is no reason, for instance, that the Okavango Delta should not be a World Heritage Site. The mission of the WHC includes such laudable aims as the ‘participation of the local population in the preservation of their cultural and natural heritage’ and the encouragement of ‘international cooperation in the conservation of our world’s cultural and natural heritage’. These are, once again, aims which parallel the aims of the TFCA.

⁴² <http://whc.unesco.org/en/list>

3. LEGISLATION AT THE REGIONAL LEVEL

3.1 THE AFRICAN CONVENTION ON THE CONSERVATION OF NATURE AND NATURAL RESOURCES (THE ALGIERS CONVENTION):

This Convention entered into force in June of 1969 and had 53 member States as of June 23rd 2006⁴³. As the Convention has now been in force for over 30 years and is seen by some as outdated, the African Union has drafted a revised Convention in order to bring the provisions up to date with recent international environmental conventions and evolution and progress in international environmental law. However, the revised Protocol has yet to come into force.

The original Convention was drafted at a time when many African countries had only very recently acquired their political independence, and was also unique amongst international treaties in that it was the first to consider the natural environment of an entire continent⁴⁴. It is interesting to note that the Preamble of the Convention, although drafted nearly 40 years ago, refers to the principles of sustainable utilization (‘Accepting that the utilization of the natural resources must aim at satisfying the needs of man according to the carrying capacity of the environment’). The ‘Fundamental Principle’ of the Convention is described in Article II, which provides that: ‘The Contracting States shall undertake to adopt the measures to ensure conservation, utilization and development of soil, water, flora and faunal resources in accordance with scientific principles and with due regard to the best interests of the people’. Thereafter, the Convention sets out the measures to be taken by individual countries in respect of various categories such as Soil⁴⁵, Water⁴⁶ and Flora⁴⁷. Of particular potential relevance to the establishment of the KAZA TFCA are the provisions relating to Faunal Resources⁴⁸, Protected Species⁴⁹,

⁴³ African Union Website: www.africa-union.org

⁴⁴ Statement by IUCN on the occasion of OAU meeting of experts for revision of the African Convention, UNEP Nairobi, 14th January, 2002

⁴⁵ African Convention on the Conservation of Nature and Natural Resources (Algiers) Article IV

⁴⁶ Algiers Convention, Article V

⁴⁷ Algiers Convention, Article VI

⁴⁸ Algiers Convention, Article VII

⁴⁹ Algiers Convention, Article VIII

Conservation Areas⁵⁰ and Interstate Co-operation⁵¹. A list of Protected Species is annexed to the Convention, but the African Elephant is not included in this list.

Although the Algiers Convention could potentially have influenced the evolution of conservation practices in all five of the KAZA TFCA Member States, only Botswana and Zambia had signed, ratified or acceded to the Convention as of July 23rd 2006⁵². Both countries were original signatories in 1968, but only Zambia has since ratified and deposited her signature to the Convention. This is despite the passage in the Preamble of the KAZA TFCA MoU which provides that ‘Member States seeking to establish this Transfrontier Conservation Area are Parties to and/or signatories of the African Convention on the Conservation of Nature and Natural Resources’. For this reason, the Algiers Convention cannot be said to be particularly pertinent to the creation of the KAZA TFCA. However, an opportunity still exists for the Member States to accede to the Convention, which would mean that they acceded to the revised version of the Convention drafted in Maputo in 2003.

The Revised Convention is a much longer document than the original. The categories which are addressed have been increased and their contents expanded upon to reflect developments in conservation and environmental policy and law. Rather than the single Principle stated in the original document, the revised version contains a passage outlining the Objectives of the Convention⁵³ and also an Article containing the Principles which shall guide the Parties in ‘taking action to achieve the objectives of this Convention and implement its provisions’⁵⁴. The principles of sustainable development are emphasised throughout, and it is expressed that all peoples have an actual right to a ‘satisfactory environment favourable to their development’⁵⁵. The revised Convention is a detailed and thorough document containing scientifically sound principles and practices for

⁵⁰ Algiers Convention, Article X

⁵¹ Algiers Convention, Article XVI

⁵² List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on African Convention on the Conservation of Nature and Natural Resources – African Union Website: www.africa-union.org

⁵³ Revised Algiers Convention, Article II

⁵⁴ Revised Algiers Convention, Article III

⁵⁵ Revised Algiers Convention, Article III(1)

conservation and sustainable use in a wide range of areas such as Vegetation Cover (Article VIII) and Species and Genetic Diversity (Article IX). The provisions on Species and Genetic Diversity, Conservation Areas (Article XII), Sustainable Development and Natural Resources (Article XIV) and on Traditional Rights of Local Communities and Indigenous Knowledge (Article XVII) are particularly relevant to the principles underlying the creation of the KAZA TFCA. Article XXII deals with co-operation between the Parties and encourages such Parties to co-operate in giving effect to the provisions of the Convention, to harmonize their policies and laws and to consult on activities which may have transboundary implications. In particular, Article XXIII(2)(e) provides that ‘whenever a natural resource or an ecosystem is transboundary, the Parties concerned shall undertake to cooperate in the conservation, development and management of such resource of ecosystem and if the need arises, set up interstate commissions for their conservation and sustainable use;’.

Adherence to the principles contained in the Revised Convention would ensure that the Member States of the KAZA TFCA had a common approach to conservation and sustainable utilisation practices in the creation of the TFCA. Furthermore, the revised document requires 15 signatures to come into force. The Member States could provide one third of these signatures and, through cooperation, become a potentially significant influence as a bloc on the future of conservation on the African continent.

3.2 THE PERMANENT OKAVANGO RIVER BASIN AGREEMENT:

The Okavango River arises in Cuanda Cubango, Angola, and then flows through Namibia before reaching Botswana and spreading out to form the fan-shaped delta (apart from periodic outflows to the Chobe channel which links to the Zambezi basin). The Okavango River Basin remains one of the least human-impacted basins on the African continent⁵⁶ but mounting socio-economic pressures from the three riparian countries threaten to

⁵⁶ United Nations – Integrated management of the Okavango River Basin:
<http://esa.un.org/techcoop/flagship.asp>

change its present character. It has been predicted that over time this change could result in irremediable environmental breakdown, and it was to this end that the Permanent Okavango River Basin Commission was established in September 1994. The purpose of this commission is to assist the three countries which share the Okavango River Basin in maintaining the domestic and global benefits of the basin by establishing agreement over the sharing of these benefits and associated liabilities through joint management of the basin's water resources. These liabilities include those of an environmental and ecological nature. The Commission consists of one delegation from each Contracting Party, each of which comprises not more than three members, although extra advisors may be appointed⁵⁷. In terms of Article 1.2, the objective of the Commission shall be to act as technical advisor to the Contracting Parties (and perform such other related functions as may be assigned to it). The various functions of the commission are described in Article 4, and these include advising the Contracting Parties on measures related to sustainable water yield, prevention of pollution and measures to combat water shortages. Whilst three of the five KAZA TFCA Member States are Contracting Parties to the OKACOM Agreement, it seems that there is little direct overlap between the provisions of the Agreement and the KAZA TFCA MoU. The Agreement provisions relate directly and solely to the utilization of the waters of the Okavango Basin, and echo the principles of sustainable utilization in consonance with the provisions of the MoU. Furthermore, the contents of the OKACOM Agreement promote the principle of transfrontier cooperation⁵⁸ and may be instrumental in forging additional transboundary links between the three parties involved.

3.3 THE SADC WILDLIFE PROTOCOL:

The most important regional instrument for conservation which operates within the KAZA TFCA area is the SADC Wildlife Protocol, which has been adopted as the basic

⁵⁷ Article 2

⁵⁸ This principle is repeated throughout the Preamble of the OKACOM Agreement

platform for regional cooperation and integration in wildlife management⁵⁹. All five of the KAZA countries are members of the Protocol, which was drafted in 1999 and came into force in November of 2003. Two crucial aspects are identified in the Protocol to guide regional cooperation and integration in wildlife management – namely the establishment of common approaches to the conservation and sustainable use of wildlife resources, and an emphasis on the effective enforcement of laws governing the use of wildlife resources⁶⁰.

The SADC website emphasizes that there must be a compromise between consumptive and non-consumptive use of wildlife. Conventional protected area management is acknowledged, but the need for community-based wildlife management resources is also stressed. The major challenge described is to develop policies, legislation and institutional structures that recognize wildlife as a viable land-use option, and allow community based management and beneficiation from wildlife resources⁶¹, and this is essentially the challenge that the Protocol seeks to address.

The preamble to the Protocol immediately addresses the issue of sovereignty. It holds that States have ‘the sovereign right to manage their wildlife resources’, but this is immediately qualified by the consecutive statement ‘and the corresponding responsibility to sustainably use and conserve these resources’. This qualification is unusual and interesting. Whilst many conventions emphasise the notion of responsibility, especially with regard to biodiversity conservation, it is perhaps surprising to find a qualification of the concept of absolute sovereignty in such a prominent position in an international convention. The concept of limitation of sovereignty recurs frequently throughout the Protocol, albeit in veiled form, as the text refers frequently to collective or cooperative action and collaboration.

The Preamble holds that the viability of wildlife resources in the region ‘requires collective and cooperative action by all SADC Member States’, and also that ‘regional

⁵⁹ SADC website: http://www.sadc.int/english/fanr/wildlife/wildlife_programme.php?

⁶⁰ Ibid

⁶¹ Ibid

management' of wildlife is necessary to promote awareness of wildlife's socio-economic value and enable equitable distribution of benefits derived from wildlife. The Preamble further acknowledges the need for cooperation among the SADC States in law enforcement, information-sharing and capacity-building, and finally expresses an intention to 'establish a common framework for the conservation and sustainable use of wildlife resources in the SADC region and to assist with the effective enforcement of laws governing those resources'. The Preamble also refers to the several international instruments as well as several regional agreements, such as the 'Master Plan for the Security of Rhino and Elephant in Southern Africa'. The emphasis on cooperation and information-sharing is undermined by an error in this section however. The text recognises that all SADC Member States are signatories to CITES, when Angola is in fact not a party to CITES⁶². This discrepancy is an oversight with particularly serious implications⁶³.

Article 3 of the Protocol is entitled 'Principles' and exhorts State Parties to ensure the conservation and sustainable use of wildlife resources under its jurisdiction. It further states that 'Each State Party shall ensure that activities within its jurisdiction or control do not cause damage to the wildlife resources of other states or in areas beyond the limits of national jurisdiction.' This is potentially an extremely important statement with regard to TFCAs in general and to transboundary wildlife conservation in particular. It is debatable whether wild animals can be considered to be the wildlife resources of State B when they are within the territorial jurisdiction of State A, even if they originated in State B. However, if this is not the case, it can further be argued that interference with a commercially valuable wildlife species (such as elephant) within a country's jurisdiction could be construed as causing damage in areas beyond the limits of that country's jurisdiction, assuming that the population in question habitually migrates across national borders. The effective import of the statement is essentially one of protection for migratory species.

⁶² See above, Chapter 2

⁶³ Ibid

Article 4 deals with the attainment of the principles referred to in Article 3, and places an enormous amount of emphasis on cooperative action and collaboration. In terms of Article 4(1)(b), States are required to develop ‘common approaches’ to the conservation and sustainable use of wildlife. 4(1)(c) requires collaborative action to achieve the objectives of international agreements to which the States are party. This provision lacks impact in the light of the inconsistent membership and inadequate application of relevant international agreements, as described above in Chapter 2. Article 4(2)(c) is directly relevant to TFCAs and provides that States are required to ‘cooperate with other Member States to manage shared wildlife resources as well as any transfrontier effects of activities within their jurisdiction or control.’ Whilst the term ‘cooperate’ is not defined and therefore probably too vague for direct enforcement, the intention underlying the provision is clearly to promote transboundary management of wildlife resources.

Article 5 contains the objectives of the Protocol and is particularly relevant with regard to TFCAs. In terms of Article 5(1), the Protocol’s primary objective is to ‘establish within the Region and within the framework of the respective national laws of each State Party, common approaches to conservation and wildlife resources and to assist with the effective enforcement of laws governing those resources.’ These ‘common approaches’ would be indispensable in the establishment of any TFCA, and this is borne out by the specific objectives described in Article 5(2). Article 5(2)(b) requires the harmonisation of the relevant legal instruments, while Article 5(2)(f) refers specifically to the ‘conservation of shared wildlife resources through the establishment of transfrontier conservation areas’.

Article 7 deals with ‘Legal Instruments for the Conservation and Sustainable Use of Wildlife’. Article 7(2) is particularly pertinent to TFCAs as it requires States Parties to harmonise national legal instruments relating to conservation and sustainable use of wildlife. The subsections of 7(2) then specify in detail what areas of legislation should be standardised. These include issues such as the protection of wildlife species and their habitats and measures governing the taking of wildlife. ‘Taking’ is comprehensively defined in Article 1 so as to include most activities which would impact negatively on

wildlife, and the cumulative effect of these provisions is therefore to require consistent standards with respect to wildlife management.

Article 8(5)(a) provides that States Parties should establish programmes and agreements to promote cooperative management of wildlife resources and habitats across international borders. In this respect, the Protocol operates as a framework document, providing for the establishment of documents such as the MoU of the KAZA TFCA discussed below. The same framework structure is apparent in Article 9, which provides for the establishment of a regional database on the status and management of wildlife⁶⁴. In terms of Article 9(2), the Wildlife Sector Technical Coordinating Unit (WSTCU)⁶⁵ shall coordinate and develop standard methodologies for wildlife inventories. Such database and inventories would be vital in transboundary wildlife resource management.

Article 10 requires States Parties to ensure effective enforcement of wildlife legislation within their own territories, and also particularly in ‘trans frontier contexts’⁶⁶. The means of such transfrontier enforcement are then elaborated upon.

From the Articles described above, it is readily apparent that the SADC Wildlife Protocol is committed to the promotion of transfrontier initiatives. It emphasises cooperation and collaboration between States repeatedly throughout. The real strength and value of this instrument however, is found in Article 13, which contains the Sanctions provisions. Article 13 provides for the imposition of sanctions against State Parties which fail to fulfil their obligations⁶⁷, or even implement policies which undermine the objectives and principles of the Protocol⁶⁸. This is something of a triumph when one considers that the greatest weakness of many international instruments is their lack of enforceability and sanctions for non-compliance. This increased enforceability is one of the greatest advantages of a regional instrument as opposed to an international instrument.

⁶⁴ Article 9(1)

⁶⁵ Established in terms of Article 6(1)(a)

⁶⁶ Article 10(3)(a)

⁶⁷ Article 13(1)(a)

⁶⁸ Article 13(1)(b)

4. LEGISLATION AT THE DOMESTIC LEVEL

4.1 Angola

Since the end of the bloody civil war in the area, Angola's body of environmental and conservation law has increased dramatically, as has her implementation of existing laws. The country is presently preparing a National Environmental Management Programme (NEMP) which is aimed at defining the priority areas for the conservation and sustainable use of natural resources. In the absence of this piece of legislation, as well as the absence of a National Environment Policy, sectoral strategies are currently being developed. The legal framework of Angola comprises a number of varying sectoral environmental laws in the fields of land, fisheries, mining, petroleum and water resources. Some laws relevant to biodiversity and Protected Areas still applicable in Angola were produced during the colonial era and are urgently in need of review and updating⁶⁹. The Ministry of Urban Affairs and Environment has launched a National Biodiversity Strategy and Action Plan (NBSAP), in terms of which the country undertakes to carry out a series of actions towards the implementation of the Convention on Biological Diversity. For the development of this strategy, a number of thematic studies were developed that present an overview of the status of biodiversity in Angola. The thematic studies represented areas such as terrestrial biodiversity, environmental legislation, demographic and socio-economic standards, sources of information and traditional knowledge, and therefore correspond intimately with the aims of the KAZA TFCA project. The overall objective of the National Biodiversity Strategy and Action Plan is: 'To incorporate measures for the conservation and sustainable use of biological diversity and fair and equitable sharing of biological resources into development policies and programmes for the benefit of all Angolans.'⁷⁰

⁶⁹ National Biodiversity Strategy and Action Plan, see above, footnote 26

⁷⁰ National Biodiversity Strategy and Action Plan (NBSAP) 2007-2012 – leaflet produced by the Republic of Angola Ministry of Urban Affairs and Environment

Priorities are defined in order to facilitate the implementation of the Strategy, and these priorities are grouped into eight separate but complementary strategic areas. The Angolan Constitution contains several provisions that promote environmental protection and reflect the need to evolve measures and strategies for the protections of natural resources in Angola⁷¹ and the Strategy aims to meld compliance with these provisions with an equivalent response to Article 112 of the Constitution which stipulates that the government is obliged to ‘elaborate and promote the execution of the economic and social development of the country’.

Various legislative instruments of Angola are targeted at sustainable development and environmental protection, and the Environment Framework Law is, in the absence of a National Environment Management Programme, the overarching document which is intended to inform all environmental legislation in Angola and sets out guiding principles for such legislation. In terms of Article 3 of the Environment Framework Law, the government shall ensure the implementation of strategies and measures aimed at guaranteeing citizens the ‘right to live in a healthy environment and the benefits of the rational utilization of the natural resources of the country.’

After the publication of the Environment Framework Law, the production of environmental legislation in the country increased considerably, but a lack of clear sectoral policies and strategies still exists, and the existing environmental legislation is poorly applied. The institutional framework situation differs from the other KAZA TFCA countries, in each of which a single ministry is responsible for tourism and conservation or wildlife. In Angola, the administration of environmental affairs is controlled by the Ministry of Urban Affairs and Environment, and tourism activities fall under the Ministry of Hotels and Tourism.

According to the National Biodiversity Strategy and Action Plan, the current protection measures for protected areas have not been efficient, and in some cases have been non-existent, due to the long period of instability in the past and to the needs of the growing

⁷¹ Articles 12(2) and 24(2) in particular.

population. The weakness of the administrative system of the existing parks and reserves is widespread, and exacerbated by lack of infrastructure and guards. This does not bode particularly well in terms of the inclusion of Angola in the KAZA TFCA, but the National Biodiversity Strategy and Action Plan does include 'Biodiversity Management in Protected Areas as one of the eight Strategic Areas, and this suggests a shift in attitudes in Angola. Objective C.4 requires that the country 'Establish a national integrated management system which allows the reconciliation of the conservation and sustainable use of biodiversity and tourism with the interests of local communities'. Whilst neither this objective nor others in the relevant Strategic Area mention transfrontier conservation specifically, the principles which are voiced do reflect those underlying the creation of the KAZA TFCA, and this suggests compatibility between the two schemes. Several other objectives and Strategic Areas are also relevant, such as Objective E, which requires government to 'Strengthen the role of rural communities in the sustainable use of biodiversity in Angola and in decision-making in this regard' and the Institutional Strengthening which comprises Strategic Area F and mandates vocational capacity building such as that of poaching guards and forest rangers. A provision particularly relevant to the KAZA TFCA and its elephant population is Objective C.4.2, which requires that the country 'Implement a moratorium banning activities of hunting of big and medium-sized mammals and other endangered species in protected areas until such a time that the animal populations are sufficiently recovered'. Furthermore, Objective D.5.2 specifically requires the implementation of a 'permanent ban on the hunting of endangered species (outside the protected areas) and contained in national and international red lists, such as the black giant sable antelope, gorilla, elephant (my underlining) and chimpanzee.' Whilst it remains to be seen whether these objectives will be implemented and given the force of law in Angola, it is clear that the intentions which will support the creation of the KAZA TFCA are present.

4.2 Botswana

The Botswana government has developed over twenty-five separate laws related to resource management issues, as well as a host of national policies⁷² but there is presently no comprehensive or consolidated environmental statute in Botswana. As described above⁷³, Botswana is also a signatory to a number of international environmental agreements. However, implementation of such multilateral agreements has in general been poor⁷⁴, and the numerous government policies on sustainable resource use⁷⁵ do not have the force of law. Furthermore, the process of effective environmental governance is hampered by a marked degree of fragmentation in that different pieces of legislation often fall under different government departments and authorities⁷⁶. This creates both gaps and overlaps in both competency and implementation. Observance and enforcement of environmental laws are weak, due primarily to a lack of institutional and human resources⁷⁷.

Botswana's Constitution contains no reference to either environmental or conservation matters, which is in contrast with constitutional developments in other African States⁷⁸.

The legal instruments most relevant to conservation in Botswana's portion of the KAZA TFCA area, are the 1990 National Conservation Strategy and the 1986 Wildlife Conservation Policy. The National Conservation Strategy is one of the measures taken to implement the Convention on Biodiversity⁷⁹ and is intended to demonstrate Botswana's commitment to sustainable development. The Botswana government has identified

⁷² UNDP Botswana website: <http://www.unbotswana.org.bw/undp/environment/htm>

⁷³ See Chapter 2: International Instruments

⁷⁴ Desire, Rubadiri 'Implementation of International Environmental Agreements: The Case of Botswana'. Presented at the Seventh International Conference on Environmental Compliance and Enforcement (http://www.inece.org/conference/7/vol1/39_Rubadiri.pdf)

⁷⁵ For example, the National Policy on Natural Resource Conservation and Development (1990)

⁷⁶ Botswana National Conservation Strategy Action Plan Consultancy, Executive Summary, Volume 5: Legislative Reforms and Provisions

⁷⁷ Botswana National Conservation Strategy Action Plan Consultancy, *ibid*

⁷⁸ For example: the right to environment contained in the Bill of Rights of South Africa's 1994 Constitution.

⁷⁹ National Report on Measures Taken to Implement the Convention on Biological Diversity: Presented at the fourth Conference of the Parties to the Convention on Biodiversity 5th – 15th May 1998 (<http://boleswa97.tripod.com/mosothwane.htm>)

primary and development goals of the strategy. The primary goals are to pursue policies and measures to integrate the work of sectoral Ministries and interest groups throughout Botswana, and to increase the effectiveness with which natural resources are used and managed. There are several development goals which are relevant to the aims of TFCAs. These include the development of multiple rather than single purpose natural resource-uses, and the development of links with neighbouring countries in conserving natural resources. Despite the existence of the National Conservation Strategy Agency, which includes senior government officials and university professors as members and is chaired by the Minister of Environment, Wildlife and Tourism, the Strategy has failed to harmonise existing environmental legislation, integrate environmental issues into the constitutional framework, or even to persuade government to promulgate any kind of National Environmental Management Act or Environmental Impact Assessment Act. There is therefore a dearth of institutional mechanisms which would allow compliance with international and regional environmental instruments to be enabled domestically. The Agency is ineffectual as a result of a lack of a firm political and legislative foundation establishing it as a national administrative body, and this lack in turn calls into question the national intent and capacity to comply with the Strategy's objectives⁸⁰.

The Wildlife Conservation Policy allows for the management and utilization of wildlife resources and is intended to manifest the government's recognition of the role that wildlife plays in the sustainable development of the country's economy. Again, the instrument is purely a policy document, and suffers from a lack of enforceability and implementation.

It can thus be seen that the two most important national framework instruments regulating Botswana's conservation and wildlife policies in terms of the KAZA TFCA are unenforceable policy documents which have done little to harmonise and integrate the country's fragmented and incoherent multitude of environment-related instruments.

⁸⁰ Desire, R, *supra* note 79

4.3 Namibia

Namibia was one of the most ardent proponents of the consumptive use of ivory, and instrumental in achieving the CITES down-listing which allowed certain SADC countries to export raw ivory⁸¹. This policy of sustainable utilisation of wildlife resources (rather than preservation) underlies the bulk of Namibian conservation instruments. This is illustrated by an emphasis on the control in trade of restricted products such as elephant ivory and rhino horn, and regulation of the wildlife industry by means of a permitting system. The Namibian Ministry of Environment and Tourism attempts to ensure the sustainability of such utilisation by means of scientific research and monitoring and the provision of specialist technical advice to any ministerial instrument involved in resource management and conservation issues⁸².

The environmental legislation inherited by Namibia upon her Independence was outdated, fragmented and incomplete, and the Ministry has consequently embarked upon a programme of revision and review of existing environmental legislation in order to establish an appropriate environmental legislation framework in Namibia⁸³

Several draft legislative instruments have been prepared which are relevant to the creation of the KAZA TFCA, including the Environmental Management Act and the Parks and Wildlife Management Act. Essentially, Namibia has undertaken a comprehensive, consultation-based reform of the Ministry's policy framework for wildlife production and utilisation in support of biodiversity conservation and economic development and the results of this are to be reflected in the Parks and Wildlife Act which will replace all existing legislation dealing with these areas. In a related theme, Namibia has been involved since 1990 in devising mechanisms for returning benefits from natural resources such as wildlife to rural communities, and the Nature Conservation Ordinance of 1975 was amended so as to allow communities to have rights to manage and earn income from wildlife similar to those currently enjoyed by

⁸¹ Ministry of Environment website: http://www.op.gov.na/Decade_peace/met.htm

⁸² Ibid

⁸³ Ibid

commercial farmers on their land⁸⁴. Namibia's practical approach to wildlife as a commercially valuable resource appears to be successful; the contribution of wildlife production and utilisation to her GDP amounted to more than N\$250 million in 1998 and was awarded the 'Gifts of the Earth' award by the World Wide Fund for Nature in 1999⁸⁵.

4.4 Zambia

Zambia has approximately ten different environmental laws⁸⁶, but only one of these is directly relevant to the creation of the KAZA TFCA, namely the Zambia Wildlife Act No 12 of 1998. The Act establishes the Zambia Wildlife Authority and defines its numerous functions. Many of these functions relate to the establishment of the TFCA, such as the establishment, control and management of national parks and the conservation and enhancement of wildlife ecosystems and biodiversity, the promotion of opportunities for the equitable and sustainable use of the special qualities of national parks, the sustainable use of wildlife and the effective management of the wildlife habitat in game management areas and the involvement of local communities in the management of game management areas. The Act places an emphasis on the involvement of local communities throughout – although it vests the ownership of all wild animals in the President, the administration and management of all natural parks, sanctuaries and wildlife management areas is to be shared with local communities. Specifically, local communities resident or with special interest in game management areas may be registered as Community Resources Boards which are then empowered to co-manage such areas and establish a fund from the proceeds for the benefit of the economic and social well being of the rest of the community. Zambia has always been progressive with regard to community-based

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ The World Law Guide: <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwezam.htm#Environmental%20Law>

wildlife projects, and a number of these have been implemented in various fields, such as anti-poaching, with positive results⁸⁷.

Of particular relevance to the wildlife within the KAZA TFCA is the provision of the Wildlife Act which empowers the Minister, in consultation with the Wildlife Authority and on the advice of any board, to specify any wild animal as a game animal or protected animal and in like manner specify any game animal as a protected animal. Furthermore, the Act authorises any person who has reasonable grounds to believe that any proposed or existing government activity, or activity of any other organisation or person which may have an adverse effect on any wildlife species or community in a national park, game management area or open area, to request the Authority that a wildlife impact assessment may be conducted.

4.5 Zimbabwe

Zimbabwe's environmental legislation is dominated by the Environmental Management Act, which was updated very recently (on March 25th 2006). Other relevant Acts include the Natural Resources Act and the Forest Act. The Environmental Management Act refers to the protection of biodiversity and the principles of sustainable utilisation, as well as to Zimbabwe's obligations in terms of international conventions, but it is the country's Parks and Wildlife Act which is more directly relevant to the establishment of the KAZA TFCA. The Act was introduced in 1975 and had the important effect of transferring some aspects of state ownership of wildlife to private landowners.

The 1990's were a period during which Zimbabwe repeatedly demonstrated her commitment to environmental protection, both through participation in and domestic enforcement of international instruments such as Agenda 21 and through the analysis and

⁸⁷ Lewis, D.M; Mwenya, A and Kaweche, G.B. 'African solutions to wildlife problems in Africa: Insights from a community-based project in Zambia' FAO Corporate Document Repository (<http://www.fao.org/docrep/t8850e04.htm>)

addressing of local issues such as land degradation⁸⁸. Community participation in wildlife management was successfully addressed during this period, particularly by innovative projects such as CAMPFIRE⁸⁹ (now defunct). However, political upheaval in Zimbabwe during the past few years, combined with massive inflation and a number of enforced evictions, has led to widespread poverty and chaos in the country. Commercial farmland set aside for wildlife amounted to 27000 sq kms in 1990⁹⁰, but most of this has been stripped of wildlife during the past few years. Many formerly pristine national conservation areas such as Hwange National Park have also been severely degraded by Zimbabweans pillaging the area for food. Little progress in enforcement or development of environmental legislation can be made in such an atmosphere. The tourist industry in Zimbabwe has virtually collapsed⁹¹ and one of the chief advantages to Zimbabwe of the creation of the KAZA TFCA may be the ‘dilution’ of the negative connotations presently associated with the country in the minds of foreign tourists.

⁸⁸ Bowyer-Boyer, T.A ‘Criticism of environmental policy for land management in Zimbabwe’ *Global Ecology and Biogeography Letters* (1996) 5, 7-17

⁸⁹ Communal Areas Management Programme For Indigenous Resources

⁹⁰ Hanks, J; *supra* note 1

⁹¹ *Ibid*

5. An Analysis of the KAZA TFCA MoU

5.1 Introduction to the MoU

The MoU for the KAZA TFCA was signed by all five countries at Victoria Falls on December 7th 2006. The document represents an agreement to establish the TFCA, and will be automatically terminated upon the coming into force of the Treaty⁹² which will formally establish the TFCA and is expected to be signed in 2010. Despite the fact that it is to be eventually superseded, the MoU is a vitally important document. It establishes the common intent of five separate countries to co-operate in the establishment of the TFCA, but is also more significant than a mere statement of intent. In terms of Article 2, the MoU ‘seeks to establish and develop a Transfrontier Conservation Area which is to be called the **Kavango–Zambezi Transfrontier Conservation Area (KAZA TFCA)**.’ It is therefore apparent that while the Treaty of 2010 is to mark the formal or *de legis* establishment of the TFCA, the signature of the MoU in 2006 represented a form of *de facto* establishment, and furthermore the MoU is to operate as a framework document guiding the natal process and operational principles of the TFCA. The MoU is to be the major instrument governing the achievement of the objectives of the TFCA for a period of more than three years. These three years will be crucial to the successful establishment of the TFCA, as it is during this period that the area should be established as a coherent region with efficient trans-boundary conservation principles in operation, and it is the MoU which should be operational in achieving this. A mere statement of intention may carry some weight as a form of moral imperative, but will probably be insufficient to mobilise the vast amount of administrative action, political determination and financial resource acquisition and distribution that will be required in order to create such an enormous TFCA. At an absolute minimum, definite principles and procedures are required in order to initiate the process and to illustrate a commitment from the states involved that is indicative of more than lip-service. In terms of the MoU document, the five countries appear convinced of the putative benefits of establishing the KAZA TFCA, but it is also a certainty that these benefits cannot be achieved without a certain amount of

⁹² Memorandum of Understanding, Article 16(2)

financial and political investment from these countries. There are financial implications which will inevitably be incurred. Whilst funding for the project seems likely to be generous, even the cost to each country of the administrative action required will be significant. What is even more likely to be a sticking point however, is the issue of sovereignty. Whilst the States involved will be unlikely to formally relinquish any aspect of their respective sovereignties in a document such as the MoU, the concrete value of a trans-boundary area necessarily governed by common principles will be eroded if there does not exist at least a tacit understanding that the principles of absolute sovereignty, whilst not formally abandoned, should not be applied in this area.

5.2 The Issue of Sovereignty and the Role of Stakeholders

The Preamble to the MoU immediately affirms that the Member States have ‘sovereign right over their natural resources’ which is a fairly standard provision and echoes the opening paragraph of the Preamble to the SADC Protocol on Wildlife Conservation and Law Enforcement⁹³. However, the paragraph continues with the words ‘and the corresponding responsibility to conserve and sustainably utilize these resources’. Again, this is a repetition of the corresponding passage in the SADC document, and represents a veiled qualification of the principle of absolute sovereignty which is encouraging in light of the collective aims of the KAZA TFCA. The specific responsibilities mentioned in the passage also echo in part the fundamental principles underlying the TFCA concept, namely those of conservation and sustainable utilisation.

The second paragraph of the Preamble specifically recognises the ‘legal and other rights of stakeholders as major contributors of land and other resources to the Kavango and Zambezi River basins’. This recognition is perhaps significant in that it could serve to

⁹³ See above, Chapter 3

allay fears in the area that the creation of the TFCA will infringe on existing rights and usages of land within the area. However, it is difficult to envisage how such recognition might remain unqualified. If every stakeholder within the vast area comprising the KAZA TFCA retains exactly the same rights that he or she holds at present, then a question arises as to what changes the creation of the TFCA will be making. Even if the management structures implementing conservation measures in the region are community-based, the existing rights of stakeholders may be impinged upon. Furthermore, the use of the term ‘legal *and other* rights’ (own italicisation) creates a potentially extremely broad range of rights which must correspondingly be afforded recognition. Exactly which rights are being recognised as rights if they are not legal rights? The rights referred to are those of ‘stakeholders’. Stakeholders are defined in Article 1 (the Definitions section) as:

‘individuals or groups of individuals or representative institutions with a stake, direct interest in the Transfrontier Conservation Area development and management, such as local or district councils; local communities (i.e. groups of people living in or adjacent to the TFCA, bound together by social and economic relations based on shared interest);’

As well as being clumsy, grammatically incorrect and incoherent, this definition is extremely broadly phrased. Apparently, anyone with a ‘direct interest’ in the TFCA development or management, as well as person or community living in the area is a stakeholder. Even those living adjacent to the outer limits of the TFCA area are defined as stakeholders, which will necessarily include tens of thousands of people who are not actually living within the area. This definition, when coupled with the recognition of legal and other rights provision from the Preamble, effectively creates a premise which would render the creation of a TFCA unworkable. It is simply not possible to afford recognition to all the legal and other rights of such an enormous category of people and then effectively implement any conservation measures in the relevant area.

The rights of stakeholders are again referred to in Article 4; the Principles section. In terms of Section 4(3), ‘The Member States will respect the rights of stakeholders recognizable under National Law and International Law’ and in terms of Section 4(4), ‘A

Member State may in terms of its domestic law enter into contractual arrangements with stakeholders regarding the protection and regulation of matters affecting such rights.’ These first of these provisions is peremptory, while the second is phrased as permissive. Member States are compelled, in terms of the MoU, to respect the rights of stakeholders, which in this instance are legal rights. Not only domestic law must be considered, but the rights of stakeholders in terms of international law must also be considered – which would include instruments such as the United Nations Universal Declaration of Human Rights (UDHR) and the corresponding African Charter on Human Rights (Banjul Charter). In theory at least, this provision would signify consistent standards of treatment being applied to stakeholders throughout the KAZA TFCA area (and those living immediately adjacent to it). At first glance, Section 4(4) appears to be a strengthening mechanism for the provision above it; a voluntary means of enforcing the respect of stakeholders’ rights. However, it is equally possible that the ‘regulation’ referred to might involve some compromise of such rights. There are certain obvious examples of rights which stakeholders may hold which would potentially be affected by the creation of the KAZA TFCA, for instance by the restoration of traditional elephant migration routes in particular.

A further issue regarding the definition of ‘stakeholders’ pertains to the use of the phrase ‘social and economic relations’ as the mechanisms which may bind communities together as stakeholders. The paragraph is so incoherently phrased that it is impossible to determine absolutely whether the bracketed section is intended as a definition of ‘local communities’ or of stakeholders in general, but it seems more likely that it is the former, as the bracketed portion is not a logical extrapolation of ‘representative institutions’ and does not correspond with ‘individuals’. In light of the conservation-based aims of the TFCA, it is perhaps unfortunate that only social and economic relations are referred to, whilst no mention of environmental or conservation factors is made anywhere in the definition. Presumably, conservation or wildlife groups in the area will be included in terms of the definition as stakeholders if they can be said to have a ‘direct interest’ in the management and development of the TFCA, but it is disappointing that they are not specifically referred to. This is especially true in light of the repeated mention of

stakeholders throughout the MoU document. For example, Article 3 which describes the geographical extent of the KAZA TFCA holds that the TFCA is to be established by the Member States ‘in consultation with their stakeholders’. The scope and methodology of such consultation is not specified, but the emphasis is unmistakable. One of the chief aims of the TFCA, and the reason for its international appeal is the emphasis on improved conservation practice in the area and it would seem appropriate to specifically mention consultation with those already involved in such practice.

It is suggested that the definition could be re-phrased as follows:

‘Stakeholders’ means individuals, groups of individuals or representative institutions with a stake or direct interest in the Transfrontier Conservation Area development and management. This includes, but is not limited to, local or district councils, wildlife or conservation interest groups and local communities (which are groups of people living in or adjacent to the TFCA who are bound together by social, economic, or other relations based on shared interest).’

Local communities are the most clearly identified group of stakeholders in terms of the existing definition in the MoU, and there are several other indications within Article 5 that such communities are to play an important role in the creation and evolution of the KAZA TFCA. There has been criticism of other transfrontier conservation projects for paying lip-service only to the role of community development and involvement⁹⁴ in the creation and management of TFCAs, and the Member States of the KAZA TFCA are apparently anxious to avoid neglecting community interests. Member States are to ‘develop mechanisms and strategies for local communities to participate meaningfully in and tangibly benefit from the TFCA;’ but the document provides little guidance as to what form these mechanisms might assume and there is a danger of this becoming a shortfall as it has done in other such projects. ‘Cultural resource management’ is to be implemented in terms of Article 5(1)(a) and it is again unclear what such management might involve. However, a further objective of the TFCA is to ‘promote alliances in the

⁹⁴ For example: Mayoral-Phillips, *supra* note 2

management of biological and cultural resources and encourage social, economic and other partnerships among the Governments and the stakeholders’⁹⁵, which suggests that the cultural resource management in question is to be at least partly community-based. In terms of Article 5(2), the Member States may ‘after consultation with stakeholders, agree to other objectives’, and this once again indicates the core role that the Member States intend the stakeholders to occupy. How meaningful consultation with such an enormous category of people from five separate countries could be achieved is not elaborated upon, unless it is in the provisions of Article 6.

Article 6, which describes the National Coordinating Agencies, refers again to stakeholders, but the relevant passage is incoherent and its import correspondingly unclear. Article 6(2) provides that the agency ‘will develop consultative structures to enable representation by these stakeholders for the co-ordination of activities leading to the establishment of the TFCA’. The sentence follows Article 6(1) which does not mention stakeholders, and the use of the word ‘these’ in Article 6(2) is therefore illogical and presumably an error. If the word is omitted, and the word ‘for’ is replaced by ‘in’, the section becomes clearer and provides guidance as to the participative role that stakeholders are expected to play. Article 6(2) refers only to the establishment of the TFCA however, and not to the management thereof once the project is established.

Reference to Article 6 is found in Article 9, which deals with the TFCA Technical Committee. In terms of Article 9(1), the Technical Committee will comprise members of the National Coordinating Agencies (which are the Ministries for Environment, Natural Resources, Wildlife and/or Tourism for each country⁹⁶), the TFCA Secretariat and ‘designated representatives of stakeholders identified through the consultative structures provided for in Article 6’. All of the responsibilities of the Technical Committee outlined in Article 9(4) deal with the establishment of the TFCA, rather than its ongoing functioning and management, which is presumably due to the fact that the MoU will be replaced by the Treaty which will contain the ongoing responsibilities of the Technical

⁹⁵ Article 5(1)(b)

⁹⁶ Article 6(2)

Committee. Article 9(4)(i) in fact designates one of the responsibilities of the Technical Committee as the ‘preparation of a draft management and development plan for the TFCA’ and this document may well perpetuate the functioning of the Technical Committee. Article 9(4)(f) states that another of the responsibilities of the Technical Committee is that of ‘ensuring stakeholder participation in the overall planning and establishment of the TFCA’. The inclusion of stakeholders in the Committee should ensure that such participation is meaningful, subject to the obvious proviso that the ‘consultative structures’ referred to in Article 6(2) do ensure a pattern of adequate and representative stakeholder participation. The potentially exceptionally wide ambit of the term ‘stakeholder’, as described above will necessarily complicate this matter.

Article 9(4)(l) identifies a further responsibility of the Technical Committee as ‘monitoring activities of stakeholders or institutions in the planning and development of the TFCA, in particular but not limited to the field⁹⁷ of immigration, customs, veterinary services, archaeology, cultural resources management, tourism development initiatives and security’. This is significant in terms of governance, as the necessary implication is that such monitoring of the activities of stakeholders will theoretically be performed, at least in part, by the stakeholders who are members of the Technical Committee. This is essentially a form of decentralised governance, and may even be translated as a bastardised form of community governance. Another significant feature of this section however, is the glaring omission of any mention of any environmental or conservation projects. Whilst the words ‘not limited to’ indicate that the list is not an exhaustive one, this is nevertheless a striking omission (which is possibly a simple oversight) when this is a list of activities or fields in a transfrontier *conservation* area. It is suggested that the term ‘wildlife and conservation services’ should be added to the present list.

In terms of Article 9(3), ‘National and International Conservation and Tourism Organizations, or any other body and/or individuals that may advance the objectives of the TFCA may be invited to participate in meeting of the Technical Committee either as observers or advisors.’ It is not made clear who will be responsible for such invitations,

⁹⁷ Presumably ‘field’ should here read ‘fields’

or whether they can be issued unilaterally by individual Technical Committee members or must be approved by the body as a whole. However, the intention is clearly to include those equipped with relevant and specialist knowledge or training in such meetings and benefit thereby. While such observers or advisors will presumably not have any concrete say in the decisions and responsibilities of the Technical Committee, the impression created is nonetheless one of transparency and a willingness on the part of the Committee members to seek advice from those best equipped to provide it.

5.3 Membership of Regional and International Conventions

The Preamble contains two paragraphs dealing with the Member States' subscription to various regional and international conventions. In terms of the first paragraph, all Member States are signatories to the SADC Treaty, the SADC Protocols on Trade and Development of Tourism and the SADC Protocol on Wildlife Conservation and Law Enforcement. In terms of the second paragraph, member States 'are Parties to and or signatories of the African Convention on the Conservation of Nature and Natural Resources (Algiers, 1968), the Convention on the Conservation of Wetlands of International Convention (Ramsar Convention, 1971), the World Heritage Convention (Paris, 1972), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on Biological Diversity.' This provision is disturbing, as it suggests a unified system of international convention membership and implementation of the common aims contained in such conventions which is simply not present in reality. As evident from the table (Figure 2) and discussion above⁹⁸, Angola and Zimbabwe are not members of Ramsar, neither Angola nor Namibia are members of

⁹⁸ See Chapter 2, particularly Fig.1

the World Heritage Convention and Angola is not a CITES member. International agreements are mentioned again in Article 5(2)(c), where Member States are urged to ‘collaborate to achieve the objectives of relevant international agreements to which they are party’. This is a principle which would bear far more weight if it related to consistent regional membership of a body of international agreements. As illustrated above, the only international and regional agreements to which all Member States are party are the SADC Wildlife Conservation and Law Enforcement Protocol, and the Convention on Biodiversity. Article 11 of the MoU describes the functions of the KAZA TFCA Secretariat, and in terms of Article 11(3)(e), one of these functions is to ‘ensure that appropriate processes and procedures in planning and developing the TFCA are followed in accordance with relevant national laws, regional procedures and international treaties’. This planning and development process is one which would presumably be facilitated by means of consistent international treaty membership. As international conventions generally require domestic implementation of their principles, this consistency would result in a trickle-down effect of domestic consistency which would in turn make the harmonisation of the Member State’s relevant legislation a far more feasible objective.

5.4 The Twin Aims of Conservation and Tourism

The final paragraph of the Preamble mentions the twin aims of the KAZA TFCA which are repeatedly referred to throughout the MoU. The section holds that the Member States desire to ‘establish a common framework for the conservation of healthy ecosystems and the development of a vibrant and sustainable tourism industry for the benefit of their peoples’.

Conservation and tourism are thus the motivating factors for the establishment of the KAZA TFCA and this is emphasised throughout the document. These aims represent a slight variation on the traditional three aims of TFCAs – namely conservation, socio-economic development and the promotion of a culture of peace⁹⁹. The conservation aim is common to both, whilst socio-economic development is more narrowly interpreted as

⁹⁹ *Supra* footnotes 9 &10

the promotion of tourism, albeit ‘for the benefit of their peoples’¹⁰⁰. There is no mention anywhere in the document of the ‘promotion of a culture of peace’. This is perhaps unsurprising in a region which has not experienced inter-state conflict; presumably, the governments involved therefore did not feel it necessary to include such an aim. Article 5 sets out the Objectives of the TFCA, and similarly contains no mention of the promotion of peace, but there is an emphasis on tourism contained within this section also. Cross-border tourism is to be promoted ‘as a means of fostering regional socio-economic development’, and the harmonization of tourism development across international boundaries is described as a method of enhancing ecosystem integrity and natural ecological processes¹⁰¹, although it is unclear why this should be so. The importance of tourism to the creation of the TFCA is again underlined by composition of the National Coordinating Agencies designated in Article 6, which shall be comprised of the ‘Ministries responsible for Environment, Natural Resources, Wildlife and/or Tourism..’¹⁰². In four of the five KAZA TFCA countries, a single ministry shares responsibility for environment/wildlife and tourism, but Angola has separate Ministries for these areas¹⁰³ and was represented at the signature of the MoU by the Minister of Hotels and Tourism¹⁰⁴. Whilst the duties of the National Coordinating Agencies are only defined with reference to the development of consultative structures enabling representation by stakeholders, an examination of article 8 reveals that the composition of the Ministerial Committee is identical to that of the National Coordinating Agencies¹⁰⁵, and the functions of the Ministerial Committee are core activities for the establishment of the TFCA. This is elaborated upon further below.

¹⁰⁰ Preamble

¹⁰¹ Article 5(1)(c)

¹⁰² Article 6(1)

¹⁰³ The Ministry of Hotels and Tourism, and the Ministry of Urban Affairs and Environment

¹⁰⁴ Marshall, Leon ‘**A Transfrontier Colossus**’ ioltravel.co.za 19th December 2006

¹⁰⁵ Article 8(1)

5.5 The Geographical Extent of the KAZA TFCA

Article 3 of the MoU describes the geographical extent of the KAZA TFCA. The areas which each country will include are mentioned, and illustrated above in Figure 1. The map in Figure 1 illustrates the vast size and uneven formation of the TFCA, and illustrates also the variety of different natural features and land uses found within the target area. In addition to the area described specifically for each country in article 3, each Member State is intended to include in the area which they allocate to the TFCA ‘other land to be determined by migratory movement of wildlife’. This is an interesting and unusual provision, and one which is directly relevant to the elephant population contained within the TFCA. ‘Wildlife’ is broadly defined in the MoU so as to include ‘non-domesticated animal and plant life occurring within natural ecosystems and habitats’, and the area is home to a number of other migratory species, such as wildebeest and numerous bird species, but few if any of these have the economic and political importance of the elephant. The expectation created by the inclusion of these provisions, which are expressly repeated for every country, is clearly that if the specifically described areas are inadequate to allow for a functionally sound geographical expansion of the existing restricted wildlife population, then even more territory will be classified as part of the TFCA. Article 3 concludes with a statement to the effect that geographical areas defined above for inclusion in the TFCA may be altered by mutual consent of the Member States – either by including further areas or by excluding areas previously included. It is potentially a measure of the commitment of these states to conservation that they should be willing to sign a document allocating as-yet unknown areas and quantities of their territories to the TFCA. It is alternatively potentially indicative of a certain disbelief in the practical impact of the TFCA creation upon the normal functions of statehood in those areas.

5.6 Objectives and Principles of the KAZA TFCA

The immediate issue to be resolved or addressed when one considers the concept of the KAZA TFCA relates to its enormous size and the ambitious scope of a project which intends to introduce some coherent conservation and tourism objectives into an area which is so vast and incorporates such a diverse array of land-use policies and practicalities. What indications are there in the MoU document of how the objectives and principles are to be achieved? How is the KAZA TFCA actually going to come into existence, and what will such existence mean for the people and wildlife living within the area and for the tourists visiting the area?

An examination of the Preamble, the Principles¹⁰⁶ and the Objectives¹⁰⁷ as described in the MoU is first required, in order to establish what the implementation of these principles and objectives can achieve.

Sovereignty is the first issue addressed in the Preamble, as discussed above, but the relevant passage effectively curtails the principle of absolute sovereignty by introducing the notion of responsibility over the natural resources involved. In this way, there is some qualification of the ‘sovereignty issue’ which has proved a stumbling block throughout the evolution of international law, as states are customarily reluctant to relinquish any aspect of traditional absolute sovereignty. Some motivation for the existence of the KAZA TFCA is found in subsequent paragraphs of the Preamble, which speaks of ‘the benefits to be derived from close co-operation and the maintenance of friendly relations with each other’ and holds that the ‘conservation and sustainable use of natural resources amongst our nations contribute to sustainable economic development and the conservation of biological diversity’. The Preamble further acknowledges the ‘need for co-operation among the collaborating Member States in managing wildlife and developing tourism, in sharing information about wildlife conservation and tourism, and in building national capacity within our nations’ and concludes by expressing the desire

¹⁰⁶ Article 4

¹⁰⁷ Article 5

to establish a common framework for the twin aims of tourism and the conservation of healthy ecosystems as discussed above. The Preamble does not contain any guidance as to how these ideals contained in this section are to be attained.

It can therefore be seen that while certain fundamental aims of the KAZA TFCA are found in the Preamble, this section of the MoU serves really to express the ideals of the project rather than to provide any concrete guidance for their achievement. This form of rather idealistic mission statement is generally recognised as the function of a Preamble and its lack of resolution therefore does not particularly detract from the value of the MoU.

Articles 4 and 5 express the Principles and Objectives of the TFCA respectively. Whilst the distinction between these two concepts is not always clear, a principle is generally seen as the ‘basic general truth which underlies a subject or system of morality’¹⁰⁸ whilst an objective is a ‘thing aimed at or wished for; purpose’¹⁰⁹. In the specific context of the MoU, it seems that the Principles are directed at the activities of the individual Member States (e.g: ‘The Member States will respect the rights of stakeholders...’¹¹⁰), whilst the Objectives pertain to the general aims of the TFCA and the collective actions of the Member States (e.g ‘The objectives of the TFCA are to:- promote cross-border tourism...’¹¹¹.)

If there is to be any degree of enforceability in the provisions of the MoU pertaining to the actions of the Member States therefore, such enforceability will relate to the provisions of Article 4. The first principle of the article holds that ‘Each Member State shall ensure the protection and management of those parts of the Kavango Zambezi ecosystem falling directly under its jurisdiction or control and the development of tourism so that activities in one country will not cause any adverse effects in areas beyond the limits of national jurisdiction.’ The grammatical inconsistency of this sentence is

¹⁰⁸ Oxford Advanced Learners Dictionary, 4th Edition, Oxford University Press

¹⁰⁹ Ibid

¹¹⁰ Article 4(3)

¹¹¹ Article 5(1)(e)

unfortunate, but the meaning remains clear. However, the statement contained here is essentially nothing more than a reiteration of one of the most well-established principles of customary international law, as stated in the *Trailsmelter* arbitration of 1941¹¹², namely that the activities of one state should not cause harm to the territory of another. As a principle of customary international law, it is enforceable through the usual channels, such as arbitration by the International Court of Justice or potentially through the SADC Arbitration Tribunal.

The second principle of Article 4 describes three areas wherein Member States are required to cooperate ‘pursuant to the attainment of the principles contained in this Article’. Article 4(2)(a) describes co-operation at the national level between various bodies, as illustrated in Figure 3 below.

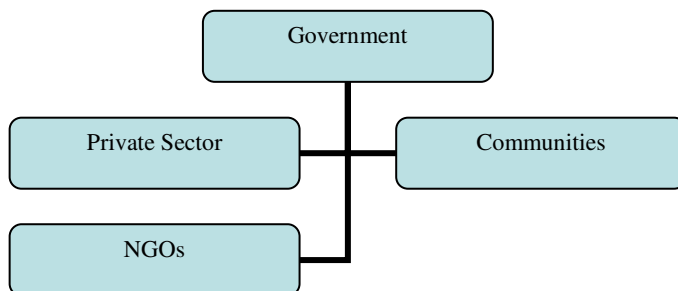


Fig.3: National co-operation envisaged in Article 4(2)(a)

Article 4(2)(b) requires Member States to ‘co-operate to develop common approaches to natural resources management and tourism development’, while Article 4(2)(c) exhorts them to ‘collaborate to achieve the objectives of relevant international agreements to which they are party.’ Both of these items are aimed at inter-governmental co-operation between Member States. The obvious flaw in Article 4(2)(c), namely the inconsistent membership and domestic implementation of the ‘relevant international agreements’ has been discussed above and detracts enormously from the significance of this provision.

¹¹² US v Canada (1941) 3 R.I.A.A

The common approaches referred to in Article 4(2)(b) are likely to prove more valuable if complied with. A common approach to natural resource management implies that previously fragmented ecosystems could be unified, and habitats and traditional migration routes restored. However, there are potential implications related to the unfettered movement of animals within the area which will also have to be considered. The large area and multiple land-use strategy of the KAZA TFCA necessarily mean that as well as wildlife a large number of domestic animals live within the area. As well as the competition for resources which these livestock represent, a possibility exists that stock diseases could be transferred from livestock to wildlife. Problems could be faced within the area with respect to foot-and-mouth and similar diseases, and the prospect of infected animals being able to cross so many international boundaries conjures up horrifying possibilities. An illustration of this, although not one related to fencing and boundaries is the current ban on fishing in the entire areas surrounding the Chobe – Zambezi confluence which is due to an outbreak of disease in the fish which is believed to be the result of increased pollution from a number of new settlements in the Caprivi area¹¹³.

A common approach to tourism development could potentially remove many of the obstacles faced by tourists in the region at present, such as the current difficulty in travelling across so many international borders. Near the confluence of the Chobe and Zambezi rivers, a visitor could theoretically enter four countries¹¹⁴ within an hour – as illustrated by the border posts in Figure 1. In the current situation however, this putative visitor will spend between thirty minutes and an hour at each border post; standing in queues, filling in forms and paying various charges, which are often spurious¹¹⁵. Such a situation can only be aggravating and discouraging for tourists. In a recent newspaper article¹¹⁶, Werner Myburgh of the Peace Parks Foundation is quoted as saying that the creation of the KAZA TFCA could be beneficial for tourism in that it would remove the necessity for tourists to clear formally through all the international border-posts contained within the area. Whilst such an objective would undoubtedly facilitate tourism, the

¹¹³ Young, Adam: local tourism business proprietor, pers. comms

¹¹⁴ Botswana, Namibia, Zambia and Zimbabwe

¹¹⁵ Visitors entering Zimbabwe, even if only in transit, must pay a 'Carbon Tax' for which no receipt is provided.

¹¹⁶ Gosling, Melanie; 'World's Biggest Park Gets Green Light', Cape Times, December 12th 2006

logistics and political implications of allowing unfettered human movement within an area the size of the KAZA TFCA and owned by five separate African countries are, at the very least, intimidating. The perimeter of the area is not fenced, and the absence of internal border controls could have serious implications for refugee and criminal movement, for example. Perhaps for these reasons, the MoU does not contain any definite proposals as to what the ‘common approaches’ referred to in Article 4(2)(b) will actually comprise.

When examined in its totality as the article containing the duties of individual States, Article 4 is woefully inadequate. When one considers the import of the phrase ‘pursuant to the attainment of the principles contained in this Article’ as used in Article 4(2), the necessary implication, as discussed above, is that the co-operation described in the sub-articles of Article 4(2) is required in order to effect only the principles expressed in Articles 4(1), 4(3) and 4(4). In other words, the various levels of co-operation are required in order for countries to ensure the protection and management of ecosystems and tourism development within their areas so as not to cause harm in areas beyond their jurisdictions (which is required of these countries in terms of international law in any event), and in order for these countries to respect the legal rights of stakeholders and enter into contractual arrangements with these stakeholders ‘regarding the protection and regulation of matters affecting such rights.’ Rights which are recognizable under national and international law are legal rights which States have a legal duty to observe and respect even in the absence of a document such as the MoU affirming this. Similarly, a Member State may act in terms of its domestic law and enter into contracts, whether or not this provision is contained in the MoU. This is further borne out by the affirmation of sovereignty contained in the first sentence of the Preamble. It can therefore be seen that the Principles contained in Article 4 have placed few if any obligations upon the Member States. The most significant value of Article 4 lies presumably in its re-iteration of the responsibilities of States to manage their ecosystems and tourist industries responsibly and sustainably, and to respect the right of stakeholders – and through this re-iteration a certain moral pressure accrues.

Article 5 sets out the objectives of the KAZA TFCA. The five objectives are contained within Article 5(1), while Article 5(2) states that the Member States may agree to further objectives, ‘after consultation with stakeholders’. The first objective, Article 5(1)(a) again emphasises inter-governmental co-operation between Member States. However, while the co-operation referred to in Article 4(2) was required in order to achieve the Principles of the TFCA, the co-operation referred to in Article 5(1)(a) is seen as an objective of the TFCA itself – in other words, one of the reasons for the TFCA’s creation is the fostering of this ‘trans-national collaboration and co-operation among Member States’. This co-operation is required in terms of Article 5(1)(a) for the purpose of implementing ‘ecosystems and cultural resource management...’. This is the first mention in the MoU document of ‘cultural resource management’. ‘Cultural Resources’ are defined in Article 1 as ‘any physical and spiritual property associated with past and present human use, cultural activities and history’. This situation, namely that of placing a value upon cultural resources and including them as a property to be protected within the context of a TFCA is an unusual one, but consistent with the wide scope of the KAZA TFCA. While TFCAs and transfrontier parks originally evolved in order to protect wildlife across borders, usually by means of excluding people and domestic animals and concentrating solely upon wildlife and ecosystem conservation within a defined and often contained area, the KAZA TFCA represents a more free-form incarnation of TFCA. The actual geographical area of the project is fairly loosely defined, a variety of existing land-use regimes are incorporated into the TFCA – including hunting, domestic farming and community land, and it seems appropriate that the aims of the KAZA TFCA should also extend beyond the traditional TFCA goals of wildlife conservation to include aims such as cultural resource protection.

Article 5(1)(b) provides that one of the objectives of the TFCA is to promote ‘alliances in the management of biological and cultural resources and encourage social, economic and other partnerships among the Government and the stakeholders’. However, the Article does not make clear whom these alliances are to incorporate. Potentially, these could operate between Governments and stakeholders as do the partnerships subsequently referred to, or potentially they have a broader ambit, incorporating, for instance, foreign

NGO's. The partnerships referred to are explicitly between the Governments and the stakeholders, but the language of the passage does not make it clear whether these partnerships are also intended to operate in relation to the management of biological and cultural resources, or whether Government - stakeholder partnerships are to be encouraged in relation to all aspects of the TFCA. This passage is one of the many in the MoU let down by a lack of clarity of expression, but the overall impression with regard to cultural resource management is that there will be stakeholder (presumably that section of the stakeholder category comprising local communities) involvement in such management. The degree of stakeholder participation in the management of biological resources is also unspecified, but the concept is repeated in Article 5(1)(d) which maintains that a further objective of the TFCA is to 'Develop mechanisms and strategies for local communities to participate meaningfully in, and tangibly benefit from the TFCA'. Despite the emphasis on this participation supplied by the words 'meaningfully' and 'tangibly', the validity of the provision will only be determined by the effectiveness of the mechanisms and strategies referred to, at such time as they are developed and implemented. As discussed above, lack of community participation, and a lack of benefits accruing to local communities has proved problematic in the past for transfrontier conservation areas in Southern Africa¹¹⁷ and it remains to be seen whether these issues will be overcome in the KAZA TFCA.

Article 5(1)(c) holds that one objective of the TFCA is to 'Enhance ecosystem integrity and natural ecological processes by harmonizing natural resource management approaches and tourism development across international boundaries' and it is this precisely this harmonization of natural resource management approaches which many proponents of the KAZA TFCA view as the project's most important function. The creation of the KAZA TFCA will politically unite a number of previously fragmented ecosystems in a geographical sense, but this could prove meaningless if the area as a whole is not consistently managed – which will obviously require harmonization of

¹¹⁷ See, for example, Draper, Malcolm and Wels, Harry 'Super African Dreams: The Mythology of Community Development in Transfrontier Conservation Areas in Southern Africa' Presented at the Seminar on Ecosystem and Nature Parks in East and Southern Africa, November 12, 2002, African Studies Centre, Leiden

management approaches. The actual mechanics of such harmonization will require extensive analysis of existing conservation policy and practice before some species of multilateral management and action plan (as referred to in Article 9(4)(i) and discussed below) can eventually be drafted. It is interesting that harmonized tourism development is seen within the context of Article 5(1)(c) as an instrument for the enhancement of ecosystem integrity and natural ecological processes, whereas tourism and conservation are seen as twin co-existing aims elsewhere in the MoU document. Presumably, the function of tourism within this scenario is a fiscal one – the increased tourist attraction of the ‘World’s Largest Park’¹¹⁸ will generate an increase in foreign revenue, a proportion of which will support conservation and sustainable ecological practices.

5.7 Institutional Framework of the KAZA TFCA

Article 7 of the MoU designates various bodies and gives an overview of their composition and functions within this Institutional Framework. The bodies designated are the Ministerial Committee, the Technical Committee, the Secretariat and certain Working Groups, Task Forces and ‘any other *ad hoc* Committees that may be established, as and when required’¹¹⁹.

The Ministerial Committee is described in Article 8, and functions essentially as an overall governing body for the KAZA TFCA. The Ministers designated in Article 6 (namely the Ministries responsible for Environment, Natural Resources, wildlife and/or Tourism) as the Coordinating Agencies are also comprise the membership of the Ministerial Committee. Essentially, it seems that the National Coordinating Agencies and Ministerial Committees are the same bodies – as they have the same members, and Article 6 only provides for one task for the National Coordinating Agencies – that of developing ‘consultative structures to enable representation by these stakeholders for the

¹¹⁸ Gosling, *supra* note 122

¹¹⁹ Article 7(c)

coordination of activities leading to the establishment of the TFCA.’¹²⁰ The functions of the Ministerial Committee, in terms of Article 8(3), are to ‘finalise the draft Treaty to establish the TFCA and present the same to their respective Governments’, to ‘be responsible for overall policy guidance in the process of establishing the TFC’ and to ‘monitor progress in the establishment of the TFCA’. These are all tasks which are indispensable for the creation of the KAZA TFCA, and illustrative of the importance of the role of the Ministerial Committee. The composition and role of the Ministerial Committee serves as a reminder that the KAZA TFCA, despite the extensive involvement of interest groups such as Conservation International and the Peace Parks Foundation and the prospectively massive amount of foreign funding, is a project controlled solely by the five governments involved.

The negotiation of the draft Treaty is likely to be a protracted and complex task, and is expected to take several years to accomplish¹²¹. The Treaty will be drafted by the Technical Committee as discussed below, and it is the actual drafting which will be time-consuming. All the members of the Ministerial Committee are also members of the Technical Committee and for this reason, once the negotiation and drafting has been achieved, ‘finalization’ should be a relatively simple formality. The draft Treaty agreed upon by the Ministerial Committee will then have to be presented to the governments of each country for approval, and, eventually, signature. This is the next step in the formal creation of the KAZA TFCA, which is expected to occur in 2010¹²². The Treaty will comprise a vital document in relation to the existence of the TFCA, as it will be the instrument containing the commitment of the five Member States to conservation and tourist development within the area. The weaknesses of the Treaty will become the weaknesses of the KAZA TFCA, which makes the task of the Ministerial Committee vitally important in this regard. The provisions of Article 8(3)(b) are related to the preceding Treaty-drafting provision in that they establish that the Ministerial Committee is to be responsible for overall policy guidance during the establishment of the TFCA. Overall policy is presumably what will be contained in the eventual Treaty. In terms of

¹²⁰ Article 6(2)

¹²¹ Myburgh, Werner, pers.comms

¹²² Gosling, *supra* note 122

Article 8(3)(c), the Ministerial Committee will also be responsible for monitoring progress during the establishment of the TFCA. The value of this provision is decreased by the fact that it is unsupported by any mention of methodology, relative standards for measuring such progress or provision for action in the event of such progress being unsatisfactory.

The composition and functions of the Technical Committee are described in Article 9. This Committee will comprise, as discussed above, the Members of the National Coordinating Agencies, the TFCA Secretariat and certain designated representatives of stakeholders¹²³. From this, it can be seen that the Ministers who solely comprise the National Coordinating Agencies in terms of Article 6 *and* the Ministerial Committee in terms of Article 8 will also be members of the Technical Committee. It is therefore not surprising that there is some overlap in the functioning of these bodies. Advice in achieving the objectives of the TFCA may be provided by interested and informed bodies and individuals, in terms of Article 9(3). The functions of the Technical Committee are describes at some length in Article 9(4) and it is immediately clear that this Committee is responsible for implementing the actual steps and processes which are necessary in order to bring the KAZA TFCA into being. Indeed, the first task designated to the Technical Committee is the identification of the steps required – in essence the Committee first decides what work they will need to do before proceeding with it. Article 9(4)(c) is a similar provision, in that the Technical Committee are here required to develop action plans for the establishment of the TFCA. In terms of Article 9(4)(i), the Committee is to prepare a draft management and development plan for the TFCA, which is presumably to provide for the management of the TFCA once it is already established.

The Technical Committee is responsible for the negotiation and drafting of the Treaty for the establishment of the TFCA¹²⁴, which will be a necessarily lengthy and complicated process. There are five separate countries involved, all of whom will have to agree with the provisions of the draft Treaty and this will undoubtedly involve a lengthy period of

¹²³ Article 9(1)

¹²⁴ Article 9(4)(b)

discussion and compromise, before the Treaty can be delivered to the Ministerial Committee for finalization. Related to the negotiation of the Treaty is the responsibility described in Article 9(4)(e) – namely the harmonization of the expectations and aims of the Governments with respect to the establishment and management of the TFCA. The establishment of a Treaty will not be possible if not preceded by such harmonization, as it precisely these shared aims and expectations which the Treaty will express. The Treaty appears to be an item of concurrent responsibility for the Ministerial and Technical Committees, as is the monitoring function provided for in Articles 8(3)(c) and 9(4)(g) respectively. The Technical Committee is also required to translate Ministerial Committee decisions into operational guidelines and strategies¹²⁵ and to prepare reports and other documentation for the Ministerial Committee¹²⁶. From these items, it seems that the Technical Committee is responsible for more practical tasks and implementation, while the Ministerial Committee fulfils more of an overseer function. There is also an inference that eventual decisions will rest with the Ministers comprising the Ministerial Committee. Decisions of the Technical Committee are to be reached by consensus¹²⁷, but the mechanism of such consensus is not described, and it is therefore not possible to speculate as to whether a simple majority would prevail in the even of a disagreement. Furthermore, although the members of the Technical Committee are designated, the membership ratio is not prescribed, and it is therefore unclear whether the Ministers will be outnumbered by the other members and vice versa.

Despite the scrupulous designation of various bodies, a closer examination of the Articles providing for the institutional framework of the TFCA reveals that the Ministers who comprise the National Coordinating Agencies in fact hold ultimate authority for all aspects of the establishment and management of the project in almost every respect. These Ministers are the only members of the National Coordinating Agencies and the Ministerial Committee. They are joined by stakeholders and the TFCA Secretariat to comprise the membership of the Technical Committee – but it is they who developed the

¹²⁵ Article 9(4)(h)

¹²⁶ Article 9(4)(j)

¹²⁷ Article 9(8)

consultative structures which enabled the representation by these stakeholders¹²⁸ and it is they who appoint the TFCA Secretariat¹²⁹. The observers and advisors to the Technical Committee in terms of Article 9(3) have no right to participate in meetings, but must be invited. It is the same Ministers in the guise of the National Coordinating Agencies who appoint the representatives who comprise the TFCA Working Groups in terms of Article 10, and these Working Groups are then required to report to the Technical Committee.

TFCA Working Groups are described in Article 10, which report to the Technical Committee¹³⁰. The responsibilities of these Working Groups comprise ‘representing the interests of different sections of society in each country regarding the planning and development of the TFCA;’¹³¹ as well as ‘collecting information and preparing technical reports in pursuance of the objectives of this MoU for Technical Committee’^{132,133} and ‘facilitating discussions on matters of mutual interest between the Member States’¹³⁴. It is unclear exactly how the Working Groups will represent the interests of different sections of society – i.e whether this will be an actual task of the groups or whether this representation will be achieved through a representative membership of the Working Groups. Although Article 10(1) provides that the Working Groups ‘shall be composed of representatives appointed by the National Coordinating Agencies’, Article 9(4)(d) holds that the Technical Committee shall be responsible for ‘setting up Working Groups for undertaking specific activities of the TFCA development’ and Article 11(3)(b) provides that is the responsibility of the TFCA Secretariat to ‘ensure that an effective TFCA Technical Committee and TFCA Working Groups are established with full representation...’. It is possible that the genesis of these Working Groups is another area of concurrent jurisdiction, or alternatively that there is some confusion surrounding their establishment.

¹²⁸ Article 6(2)

¹²⁹ Article 11(1)

¹³⁰ Article 10(4)

¹³¹ Article 10(2)(a)

¹³² This should read ‘the Technical Committee’

¹³³ Article 10(2)(b)

¹³⁴ Article 10(2)(c)

The Secretariat is established in terms of Article 11(1) in order to ‘promote efficiency, coordination and accountability in the TFCA planning and development process’, and headed by a Project Coordinator. The functions of the Secretariat are relatively numerous and are laid out in the provisions of Article 11(3). In terms of Article 11(3)(b), it is the responsibility of the Secretariat to ‘ensure that an effective TFCA Technical Committee and TFCA Working Groups are established with full representation, and that a working programme focused on achieving the objectives of the TFCA is sustained’. This represents a duplication (or even triplication) of the functions of other bodies with regard to the establishment of Working Groups, as discussed in the preceding paragraph, and furthermore there is provision elsewhere for other institutions, such as the Technical Committee, to create programmes to achieve the objectives of the TFCA¹³⁵. Article 11(3)(d) provides that the Secretariat is to ‘coordinate the drafting and implementation of an effective implementation plan for achieving the objectives of the TFCA, with full participation of the relevant stakeholders’, whereas the Technical Committee is already obliged to ‘ensure stakeholder participation in the overall planning and establishment of the TFCA¹³⁶’, develop ‘action plans for the establishment of the TFCA¹³⁷’ and prepare a ‘draft management and development plan for the TFCA¹³⁸’. This duplication of function is also found elsewhere in the descriptions of the responsibilities of the Secretariat. Article 11(3)(c) requires the Secretariat to ‘coordinate the drafting of the Treaty for presentation to the Ministerial Committee through the Technical Committee’. As the negotiation and drafting of the Treaty is already a responsibility of the Technical Committee, it is unclear what form such coordination might assume. The provisions of Article 11(3)(e) determine that it is the Secretariat which is responsible for ensuring that ‘appropriate processes and procedures in planning and developing the TFCA are followed in accordance with relevant national laws, regional protocols and international treaties’ and this is a task fraught with potentially enormous difficulties. There are five suites of national laws applicable, a significant number of regional protocols and, as discussed above, a matrix of international treaties to which some KAZA TFCA Member States are

¹³⁵ For example, Article 9(4) provides for similar functions for the Technical Committee

¹³⁶ Article 9(4)(f)

¹³⁷ Article 9(4)(c)

¹³⁸ Article 9(4)(i)

party and others are not. This morass of legal instruments will have to be thoroughly examined and reconciled before concrete strategies for planning and development of the TFCA can be embarked upon, and the legal situation in the event of any dispute regarding aspects of the area will also have to be determined in the light of this existent body of legislation as well as the legal instruments developed specifically for the KAZA TFCA.

With the exception of Article 11(3)(i), the remaining tasks assigned to the Secretariat are chiefly administrative in nature – such as the provision of management and financial progress reports¹³⁹ and the facilitation of meetings of the other institutional bodies¹⁴⁰. Article 11(3)(i) however, requires that the Secretariat ‘foster collaboration and linkages with other organizations’. With the exception of the provision which allows bodies or individuals that may advance the objectives of the TFCA to be invited to participate in Technical Committee meetings either as observers or advisors¹⁴¹, this is the only article which makes express provision for the involvement of interested parties who are neither stakeholders nor Ministers. There are an enormous number of bodies already involved at some level with the KAZA TFCA project¹⁴² and this number can only increase exponentially as the TFCA scheme gathers momentum. This fostering of collaboration and linkages will be a complicated and extensive undertaking, requiring a large number of skilled personnel in order to be effective.

5.8 Financing of the KAZA TFCA

The financing levels required in order to fund a project as wildly ambitious as the KAZA TFCA will be enormous, and the administrative logistics similarly taxing. Article 12 of the MoU is entitled ‘Financing’ and rather baldly lists three sources ‘for the implementation of this MoU’, namely Member State contributions (to be determined by

¹³⁹ Article 11(3)(j)

¹⁴⁰ Article 11(3)(g)

¹⁴¹ Article 9(3)

¹⁴² For example: The Peace Parks Foundation, Conservation International and the IUCN

the Ministerial Committee on the recommendations of the Technical Committee), donations and contributions from other stakeholders and development partners (with the approval of the Technical Committee). Article 12 does not provide for any consequences to attach to non-payment of such contributions. A massive amount of external financing will be required, in order to fund a large number of specific projects and activities associated with the establishment of the TFCA. The provisions of Article 12 contain no indication of the size of the contributions required of the Member States – only that these levels will be determined by the Ministerial Committee. The countries involved possess divergent levels of wealth, but all are third-world countries with other financial priorities and none, with the possible exception of Botswana, can be said to be wealthy. It seems a certainty that the contributions of the Member States will not even begin to cover the costs of establishment of the TFCA, and therefore that a substantial shortfall will have to be provided for by means of the provisions of Article 12(2) and Article 12(3), namely donations and contributions from other stakeholders and development partners. Article 12 makes no attempt to delimit which institutional bodies will be responsible for the accumulation and distribution of these funds. In terms of Article 9(4)(k), the Technical Committee is responsible for ‘overseeing the administration of funds generated for the establishment of the TFCA’ but no reference is made to the actual source of these funds. Similarly, two provisions of Article 11 refer to functions of the Secretariat with regard to funding. In terms of 11(3)(h), the Secretariat is required to liaise with the Technical Committee in ‘identifying activities that would require funding and assist with the mobilization of resources’ and to ‘provide regular management and financial progress reports’ in terms of Article 11(3)(j). Again, neither of these provisions refers to the actual solicitation or acquisition of such funds, unless this is what is referred to by the phrase ‘mobilization of resources’.¹⁴³ It is suggested that this is an inadequacy of the Memorandum. The emphasis on an increased volume of tourism as a primary motivation for the establishment of the TFCA is repeated throughout the Memorandum, and the putative socio-economic benefits of the scheme are also frequently referred to. These factors suggest that the impetus for the Member States to establish the KAZA TFCA is substantially financially motivated. This view does not constitute a criticism of such

¹⁴³ Article 11(3)(h)

motivation; most African countries simply cannot afford to devote significant financial resources to conservation schemes which do not offer substantial returns, and latter-day principles of sustainable development uphold this premise. However, stringent attention to financial detail will be required in order to avoid foreseeable problems such as duplication and corruption; a vigilant and meticulous attitude towards the financial management of the creation of the KAZA TFCA should be exhibited from the first and the MoU is precisely the document in which such an attitude should be made obvious.

5.9 Enforcement of Provisions

The weakness of many international conventions and multilateral treaties is a lack of provision for enforcement or, more specifically, provision for the imposition of any kind of penalty in the event of non-compliance with the articles and agreements contained in such documents. The provisions of the articles of the KAZA TFCA MoU are no exception. Scrutiny of the document reveals that not a single provision relates to enforcement. Non-compliance with any of the Articles contained in the MoU would presumably result in some category of dispute however, and Article 13 is entitled ‘Settlement of Disputes’. In terms of the provisions of Article 13(1), ‘Any dispute between Member States arising out of the interpretation or implementation of this MoU will be settled amicably through consultation and/or negotiation between the Parties concerned.’ This appears to be an Article of little worth. The ministers comprising the Ministerial Committee are responsible for ‘overall policy guidance’¹⁴⁴ and the finalization of the draft Treaty,¹⁴⁵ and decisions of the Ministerial Committee are reached by consensus¹⁴⁶. Furthermore, these Ministers, as explained above, play a definitive role in the membership of all other institutions involved in the creation of the KAZA TFCA, and will consequently be instrumental in the creation *and* approval of every decision taken by every institutional body of the TFCA. If issues of dissent arise with respect to the interpretation or implementation of the MoU, these issues will necessarily arise as a

¹⁴⁴ Article 8(3)(b)

¹⁴⁵ Article 8(3)(a)

¹⁴⁶ Article 8(2)(c)

consequence of a lack of consensus between certain parties, and will therefore not be resolvable simply through amicable consultation or negotiation between the Parties concerned.

Article 13(2) attempts to provide for such failure to reach consensus, and reads ‘Should the aforesaid dispute not be resolved in the manner referred to above, any Party may submit the said dispute for arbitration to SADC’. There is no accompanying provision wherein the Member States agree to abide by the results of such arbitration, or provision for such arbitration to be binding in any way. Effectively, Article 13 does not create any enforceability of the provisions of the Memorandum, and in the absence of any enforceability, it is questionable whether these provisions are in fact binding upon the Member States. The implications of this lack of enforceability are less pronounced than they might otherwise be, however, in light of the fact that the provisions of the MoU place very few concrete obligations upon the Member States themselves. As discussed above, the Principles (Article 4) and Objectives (Article 5) provisions are formulated in such a way as to give the appearance of creating obligations but in fact amount to little other than widely-phrased statements of intent. The responsibilities of the National Coordinating Agencies and the institutions created in terms of Article 7 are rather more clearly defined, but it is debatable whether a dispute resulting from the interpretation of these duties could be classified as a dispute ‘between Member States’. The resolution of such a dispute should instead rather be an administrative manner, adjudicated in terms of a system of administrative checks and balances. This system is apparent in some instances in the MoU, for instance in the reporting functions of the Secretariat and the overall policy guidance of the Ministerial Committee, but may be hampered or indeed flawed by the constant re-appearance of the same individuals at every step of the institutional framework.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

The signature of the MoU demonstrates a commitment on the part of the five Member States to the establishment of the KAZA TFCA, but the extent and effect of this commitment remain to be determined. The MoU is obviously already in force, and the issues which emerge as weaknesses or potential weaknesses therein will need to be resolved in its succeeding document, the KAZA TFCA Treaty. This chapter is intended to identify such areas of weakness and propose how these may be subsequently addressed.

6.1: Participation in International and Regional Conventions:

The Member States' participation in international conventions related to the objectives of the TFCA is disturbing, as the States are generally poorly represented in the biodiversity related conventions. Furthermore, at a regional level, the Member States are poorly represented in terms of the Algiers Convention. As outlined in the previous chapter, several of these conventions contain objectives and mechanisms which would facilitate the establishment and management of the TFCA.

In order to address this concern, it is suggested that the forthcoming Treaty contain a provision urging the Member States to become members of whichever biodiversity-related Conventions they have not acceded to, and also exhorting all five States to sign the newly amended African Convention on the Conservation of Nature and Natural Resources.

6.2: Provision for Enforcement and Penalties for Non-compliance:

One of the most striking features of the SADC Wildlife Protocol is the content of Article 13, which provide for sanctions as a penalty for non-compliance with the provisions of the Protocol. This is an unusual feature of an international or regional instrument, as these documents normally have to strike a fine balance between containing provisions which do not threaten the sovereignty of States and thus prevent them from becoming members but are nonetheless not totally ineffectual. In contrast, the Protocol is remarkably firm in that it provides for enforceability. This potential for enforceability makes all the provisions of the Protocol more binding upon and between its members. The fact that all five Member States are signatories to the Protocol indicates that they are prepared to accept this level of enforcement and the potential consequences of non-compliance, and this is something which should be capitalised upon in the drafting of the KAZA TFCA Treaty.

Consequently, it is suggested that the KAZA TFCA Treaty contain an Article similar to Article 13 of the SADC Protocol, providing for penalties in the event of non-compliance with the provisions of the Treaty. Such penalties could theoretically assume the same form as those contained in Article 13, namely sanctions for non-compliance and also for the introduction of policies or programmes which undermine the functioning of the KAZA TFCA.

6.3: Mandatory Inclusion of Environmental Ministers:

Article 6 of the MoU describes the composition of the National Coordinating Agencies, which is identical to the composition of the Ministerial Committee, and the members of whom have significant, if not overriding (see further below, in 6.4) influence on the entire institutional functioning of the KAZA TFCA. In terms of this Article, the ‘Ministries responsible for Natural Resources, Wildlife and/or Tourism as the Coordinating

Agencies' shall be designated as the Coordinating Agencies by their Member States. While the spheres of tourism and wildlife/conservation are both allocated to single Ministries in Botswana, Namibia, Zambia and Zimbabwe, they are divided between separate Ministries in Angola. The Minister of Hotels and Tourism represented Angola at the signing of the MoU, rather than the Minister of Environment and Urban Affairs. Whilst it is not made clear which Minister will become a member of the National Coordinating Agency on behalf of Angola, the formalities of the MoU suggest that it will not be the Minister of Environment and Urban Affairs. It is suggested that, while tourism is to be an important function of the KAZA TFCA, the primary reason for the genesis of the project is, as the name suggests, conservation. In light of this, it is only appropriate that each Member State's Minister responsible for environmental administration represent that country, and this should be mandated in the forthcoming Treaty.

6.4: Decentralisation of Powers:

As explained in the previous chapter, a possibly significant feature of the MoU is its vesting of administrative and decisive powers potentially almost entirely in the five Ministers comprising the Ministerial Committee. Whilst this may be simply a side-effect of the desire of the Member States not to compromise their sovereignty in any way by allowing any significant powers to devolve upon non-governmental bodies, the result is nonetheless a potentially skewed allocation of responsibility. If disagreements arise between members of the Ministerial Committee, these disagreements are likely to pervade every institutional aspect of the creation and functioning of the KAZA TFCA, and in this way the institutional arrangements may be viewed as obstructionist or counter-productive. As outlined above, the successful establishment of the TFCA is going to depend heavily upon external funding and foreign investors are always alert to any whiff of corruption in African countries – this is also a risk which could be averted by more decentralisation of powers with regard to the TFCA. It is suggested that this be achieved in the Treaty by means of inclusion of specifically designated numbers of stakeholders as

members of the Technical Committee so as to outweigh the presence of the designated Ministers. Furthermore, the expertise of different interest groups should play a more significant role in the Technical Committee, as described further below (see 6.4)

6.5: Stakeholder Representation

‘Stakeholders’ are broadly defined in terms of the MoU and their interests are frequently referred to, but more definition is required in order to ensure that these interests are in fact actually addressed. The different types of interest group who may fall into the category should be more clearly identified in order to ensure adequate representation. The ‘consultative structures’ (Article 6 of the MoU) used to select the stakeholders and enable stakeholder representation in, for instance, the Technical Committee, should be clearly defined as including stakeholders from various interest groups in order to balance the interests of local communities, conservation and ecology factions and tourism-related representatives, all of whom may be defined as ‘stakeholders’ in terms of the MoU.

6.6: Harmonization of Environmental Policy:

Although Article 5 of the MoU mentions the harmonization of natural resources management approaches and tourism development across international boundaries and Article 9 requires the Technical Committee to harmonize the expectations and aims of the Member State Governments, the document does not prescribe any harmonization of environmental policy for the area. It is suggested that a system of consistent policy for like areas and migratory species would greatly facilitate the functioning of the TFCA, and

that the Treaty should provide for legislative review in order to achieve this harmonization.

6.7: Concluding Remarks:

The KAZA TFCA Memorandum of Understanding is essentially a tentative document and the first step in a protracted, complex and ambitious process, the magnitude of which has not been attempted on our continent before. As such, it would be unrealistic to expect too much in the way of concrete obligations to be established at this early stage.

However, certain issues involved in the creation of a TFCA involving five countries will have to be addressed and these intentions must be obvious from the outset if the project is to achieve any practical value. Inconsistent membership of the international conventions which might influence the conservation management (namely CITES and the Bonn Convention) and a lack of harmonization of domestic conservation policy means that the SADC Wildlife Protocol is the only sphere in which all five countries have affirmed their common intentions with regard to wildlife conservation. Whilst the principles enumerated in the MoU are worthy ones, of transboundary cooperation, economic development through tourism, stakeholder participation, biodiversity conservation and sustainable development and it is undeniable that no TFCA could be established without these objectives, the MoU's chief value is as a source of moral pressure accruing upon the countries involved. Firm and enforceable commitments and action plans are required from the Treaty if the project is to succeed.

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The Ramsar Convention: <http://www.ramsar.org/key-cp-e.htm>

APPENDIX A: THE KAZA TFCA MOU

MEMORANDUM OF UNDERSTANDING

Made and entered into by and between

THE GOVERNMENTS OF:

THE REPUBLIC OF ANGOLA,

THE REPUBLIC OF BOTSWANA,

THE REPUBLIC OF NAMIBIA,

THE REPUBLIC OF ZAMBIA,

AND

THE REPUBLIC OF ZIMBABWE

Concerning

THE ESTABLISHMENT OF THE KAVANGO-ZAMBEZI TRANSFRONTIER
CONSERVATION AREA

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PREAMBLE

We, the Governments of:

The Republic of Angola;

The Republic of Botswana;

The Republic of Namibia;

The Republic of Zambia and

The Republic of Zimbabwe,

Hereinafter jointly referred to as the “Parties” and/or “Member States”.

AFFIRMING that Member States have sovereign right over their natural resources and the corresponding responsibility to conserve and sustainably utilize these resources;

RECOGNISING the legal and other rights of stakeholders as major contributors of land and other resources to the Kavango and Zambezi River basins;

CONSCIOUS of the benefits to be derived from close co-operation and the maintenance of friendly relations with each other;

AWARE that the conservation and sustainable use of natural resources amongst our nations contribute to sustainable economic development and the conservation of biological diversity;

RECALLING that all Parties to this Agreement are signatories to the Southern African Development Community (SADC) Treaty 1992, SADC Protocols on Trade (1996), Development of Tourism (1998), and Wildlife Conservation and Law Enforcement (1999);

FURTHER RECALLING that Member States seeking to establish this Transfrontier Conservation Area are Parties to and/or signatories of the African Convention on the Conservation of Nature and Natural Resources (Algiers, 1968), the Convention on the Conservation of Wetlands of International Importance (Ramsar Convention, 1971), the

World Heritage Convention (Paris, 1972), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (Washington, 1973) the Convention on Biological Diversity (Rio de Janeiro, 1992); and

ACKNOWLEDGING the need for co-operation among the collaborating Member States in managing wildlife and developing tourism, in sharing information about wildlife conservation and tourism, and in building national capacity within our nations;

DESIRING to establish a common framework for the conservation of healthy ecosystems and the development of a vibrant and sustainable tourism industry for the benefit of their peoples;

NOW THEREFORE the Member States have agreed as follows: -

ARTICLE 1

Definitions

In this Memorandum of Understanding (hereinafter referred to as the “MoU”) the terms and expressions defined in Article 1 shall bear the same meaning unless the context otherwise requires:

“Conservation”	means the protection, maintenance, rehabilitation, restoration and enhancement of the biological and non-biological resources;
“Cultural resources”	means any physical and spiritual property associated with past and present human use, cultural activities and history;
“National Coordinating Agency”	means that body identified in Article 6 for such purposes;
“NP”	means National Park;
“Stakeholders”	means individuals or groups of individuals or representative institutions with a stake, direct interest in the Transfrontier Conservation Area development and management, such as local or district councils; local communities (i.e. groups of people living in or adjacent to the TFCA, bound

together by social and economic relations based on shared interest);

“Sustainable use”

means use in a way and at a rate that does not lead to the long-term decline of renewable natural resources;

“Transfrontier Conservation Area”
(TFCA)

means the area or the component of a large ecological region that straddles the boundaries of two or more countries, encompassing one or more protected areas, as well as multiple resources use areas and

“Wildlife”

means non-domesticated animal and plant life occurring within natural ecosystems and habitats.

ARTICLE 2

Scope and Name of the TFCA

This MoU seeks to establish and develop a Transfrontier Conservation Area which shall be called **Kavango-Zambezi Transfrontier Conservation Area (KAZA TFCA)**.

ARTICLE 3

Geographical Extent of the KAZA TFCA

(1) The Member States shall, in consultation with their stakeholders, jointly establish the KAZA Transfrontier Conservation Area, which will include the areas known as:-

(a) In the Republic of Angola,

The Luiana Partial Reserve and Mavinga Partial Reserve, Long-Mavinga Hunting Area, Luengue Hunting Area, Luiana Hunting Area, Mucusso Hunting Area and other land to be determined by migratory wildlife movement.

(b) In the Republic of Botswana,

The Okavango Delta (including the Moremi Game Reserve, Chobe-Linyanti river system (including the Chobe NP), Makgadikgadi – Nxai NP and other land to be determined by migratory wildlife movement.

(c) In the Republic of Namibia,

The Bwabwata NP, Mudumu NP, Mamili NP, the Caprivi State Forest Reserve, Khaudom Game Park, conservancies in between them and other land and to be determined by migratory wildlife movement.

(d) In the Republic of Zambia:

The Kafue NP and adjoining Game Management areas, Sioma-Ngwezi NP, Mosi-oa-Tunya NP, Mumbwa, Namwala and West-Zambezi Game Management Areas, the Siavonga area and other land to be determined by migratory wildlife movement.

(e) In the Republic of Zimbabwe:

The Hwange NP, Zambezi NP, Kazuma Pan NP, Matetsi and Deka Safari Areas, adjoining designated Forest Areas, with potential expansion eastwards to Lake Kariba, Matusadonha NP, Chizarira NP, Chirisa Safari Area, and Chete Safari Area and other land to be determined by migratory wildlife movement.

In defining the geographical areas for inclusion in the TFCA as outlined above, it is understood that this does not preclude the later inclusion and/or exclusion of additional areas into and out of the TFCAs, provided that such amendments shall be done by mutual consent of the Member States and in keeping with the objectives of the MoU.

ARTICLE 4

Principles

- 1) Each Member State shall ensure the protection and management of those parts of the Kavango Zambezi ecosystem falling directly under its jurisdiction or control and the development of tourism so that activities in one country will not cause any adverse effects in areas beyond the limits of national jurisdiction.

- 2) Pursuant to the attainment of the principles contained in this Article, Member States shall;
 - a) ensure co-operation at the national level among governmental authorities, communities, non-governmental organizations and private sector;
 - b) co-operate to develop common approaches to natural resources management and tourism development and;
 - c) collaborate to achieve the objectives of relevant international agreements to which they are party.
- 3) The Member States will respect the rights of stakeholders recognizable under National Law and International Law.
- 4) A Member State may in terms of its domestic law enter into contractual arrangements with stakeholders regarding the protection and regulation of matters affecting such rights.

ARTICLE 5

Objectives of the TFCA

- 1) The objectives of the TFCA are to:-
 - (a) Foster trans-national collaboration and co-operation among Member States in implementing ecosystems and cultural resource management through the establishment and development of the TFCA;
 - (b) Promote alliances in the management of biological and cultural resources and encourage social, economic and other partnerships among the Governments and the stakeholders;
 - (c) Enhance ecosystem integrity and natural ecological processes by harmonizing natural resources management approaches and tourism development across international boundaries;
 - (d) Develop mechanisms and strategies for local communities to participate meaningfully in, and tangibly benefit from the TFCA;
 - (e) Promote cross-border tourism as a means of fostering regional socio-economic development

- 2) The Member States may, after consultation with stakeholders, agree to other objectives.

ARTICLE 6

National Coordinating Agencies

- 1) In order to give effect to the intent and objectives as expressed in this MoU, the Member States shall designate the Ministries responsible for Environment, Natural Resources, Wildlife and/or Tourism as the Coordinating Agencies.
- 2) A National Coordinating Agency will develop consultative structures to enable representation by these stakeholders for the co-ordination of activities leading to the establishment of the TFCA.

ARTICLE 7

Institutional Framework

The institutional framework of this MoU will be:-

- (a) the Kavango-Zambezi TFCA Ministerial Committee;
- (b) the Kavango-Zambezi TFCA Technical Committee;
- (c) the Kavango-Zambezi TFCA Working Groups, Task Forces and any other *ad hoc* Committees that may be established , as and when required;
- (d) the Kavango-Zambezi TFCA Secretariat.

ARTICLE 8

Ministerial Committee

- 1) The Ministerial Committee will comprise of the Ministers responsible for the Coordinating Agencies as defined under Article 6 of this MoU;
- 2) The Committee will:
 - (a) be hosted on a rotational basis, with the country hosting providing the Chairperson for the meeting;
 - (b) ordinarily meet once a year; and
 - (c) make decisions by consensus.
- 3) The Committee will:
 - (a) finalize the draft Treaty to establish the TFCA and present the same to their respective Governments and;
 - (b) be responsible for overall policy guidance in the process of establishing the TFCA and;
 - (c) monitor progress in the establishment of the TFCA.

ARTICLE 9

Technical Committee

- 1) The Technical Committee shall be made up of members of the National Coordinating Agencies and designated representatives of stakeholders identified through the consultative structures provided for in Article 6. The TFCA Secretariat as defined in Article 11 shall be a member of the Technical Committee.

- 2) To maintain continuity, designated members of the Technical Committee shall attend all meetings in person and where an alternative is to attend a meeting, the designated member will ensure that the alternate is fully briefed and given the necessary authority and mandate to act as a member of the Technical Committee.
- 3) National and International Conservation and Tourism Organizations, or any other body and/or individuals that may advance the objectives of the TFCA may be invited to participate in meetings of the Technical Committee either as observers or advisors.
- 4) The Technical Committee shall be responsible for:-
 - (a) identifying the steps required for establishing the TFCA;
 - (b) negotiating and drafting the Treaty for the establishment of the TFCA;
 - (c) developing action plans for the establishment of the TFCA;
 - (d) setting up Working Groups for undertaking specific activities of the TFCA development;
 - (e) harmonizing the expectations and aims of the Governments with respect to the establishment and management of the TFCA;
 - (f) ensuring stakeholder participation in the overall planning and establishment of the TFCA;
 - (g) monitoring the establishment of the TFCA;
 - (h) translating decisions of the Ministerial Committee into operational guidelines and strategies;
 - (i) preparation of a draft management and development plan for the TFCA;
 - (j) preparing reports and other documentation for the Ministerial Committee;
 - (k) overseeing the administration of funds generated for the establishment of the TFCA; and
 - (l) monitoring activities of stakeholders or institutions in the planning and development of the TFCA, in particular but not limited to the field of immigration, customs, veterinary services, archaeology, cultural resources management, tourism development initiatives and security.

- 5) The Technical Committee shall be chaired on a rotational basis, with the host country providing the chairperson for that meeting.
- 6) The Technical Committee shall adopt its own rules of procedure.
- 7) The Technical Committee shall meet at least four times a year, or more frequently depending on need.
- 8) Decisions of the Technical Committee shall be by consensus.

ARTICLE 10

TFCA Working Groups

- 1) The Working Groups shall be composed of representatives appointed by the National Coordinating Agencies.
- 2) The Working Groups shall be responsible for:
 - (a) representing the interests of different sections of society in each country regarding the planning and development of the TFCA;
 - (b) collecting information and preparing technical reports in pursuance of the objectives of this MoU for Technical Committee; and
 - (c) facilitating discussions on matters of mutual interest between the Member States.
- 3) The Working Groups will adopt their own rules of procedure.
- 4) The Working Group shall report to the Technical Committee.

ARTICLE 11

The Secretariat

- 1) To promote efficiency, coordination and accountability in the TFCA planning and development process, a TFCA Secretariat will be established by the Ministerial Committee through recommendations of the Technical Committee.
- 2) The Secretariat shall be headed by a Project Coordinator.

- 3) The functions of the Secretariat shall be to –
- (a) drive and coordinate the activities associated with the planning and development of the TFCA;
 - (b) ensure that an effective TFCA Technical Committee and TFCA Working Groups are established with full representation, and that a working programme focused on achieving the objectives of the TFCA is sustained;
 - (c) coordinate the drafting of the Treaty for presentation to the Ministerial Committee through the Technical Committee;
 - (d) coordinate the drafting and implementation of an effective action plan for achieving the objectives of the TFCA, with full participation of the relevant stakeholders;
 - (e) ensure that appropriate processes and procedures in planning and developing the TFCA are followed in accordance with relevant national laws, regional protocols and international treaties;
 - (f) prepare reports on resolutions and directives emanating from the Ministerial and Technical Committees;
 - (g) facilitate the convening of meetings of the TFCA Committees and Working Groups;
 - (h) liaise with the Technical Committee in identifying activities that would require funding and assist with the mobilization of resources;
 - (i) foster collaboration and linkages with other organizations;
 - (j) provide regular management and financial progress reports; and
 - (k) carry out any other assignments deemed necessary for achieving the objectives of the TFCA committees.

ARTICLE 12

Financing

Funding for the implementation of this MoU shall consist of:-

- 1) Member States contributions, the level of which shall be determined by the Ministerial Committee on the recommendations of the Technical Committee.
- 2) Donations.
- 3) Contributions from other stakeholders and development partners with the approval of the Technical Committee.

ARTICLE 13

Settlement of Disputes

- 1) Any dispute between Member States arising out of the interpretation or implementation of this MoU will be settled amicably through consultation and/or negotiation between the Parties concerned.
- 2) Should the aforesaid dispute not be resolved in the manner referred to above, any Party may submit the said dispute for arbitration to SADC.

ARTICLE 14

Entry into Effect

This MoU shall enter into force upon signature by any three (3) of the participating Governments.

ARTICLE 15

Amendments

Any proposal for the amendment of this MoU by a Member State, shall be notified in writing to other Member States for at least three months before it is considered for adoption by the Member States and shall enter into force upon such adoption.

ARTICLE 16

Withdrawal

- 1) Any Member State may withdraw from this MoU at any time by giving written notice of not less than twelve months to the other Member States.
- 2) This MoU shall automatically terminate upon the entry into force of a Treaty on the establishment of the Kavango-Zambezi Transfrontier Conservation Area.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Memorandum of Understanding in triplicate in the English and Portuguese languages, all texts having equal validity.

THUS DONE and signed at Victoria Falls, Zimbabwe on this..... .. day of
.....2006.

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FOR THE GOVERNMENT OF THE REPUBLIC OF ANGOLA

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FOR THE GOVERNMENT OF THE REPUBLIC OF BOTSWANA

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FOR THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

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FOR THE GOVERNMENT OF THE REPUBLIC OF ZAMBIA

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FOR THE GOVERNMENT OF THE REPUBLIC OF ZIMBABWE